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THE

NORTHERN IRELAND LAW REPORTS

CONTAINING

REPORTS OF CASES ARGUED AND DETERMINED

IN

THE HIGH COURT OF JUSTICE

AND ON APPEAL THEREFROM IN

THE COURT OF APPEAL

IN

NORTHERN IRELAND

EDITED BY

FRANCIS NEWARK,

BARRISTER-AT-LAW

1958

BELFAST:

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FOR NORTHERN IRELAND

1958

Lord Chief Justice:

THE RIGHT HON. Lord MACDERMOTT.

Lords Justices of Appeal:

THE RIGHT HON. ARTHUR BLACK.

THE RIGHT HON. LANCELOT ERNEST CURRAN.

Chancery Division:

THE HON. HERBERT ANDREW MCVEIGH.

Queen's Bench Divison:

THE HON. CHARLES LEO SHEIL.

Attorney-General:

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CASES

DETERMINED BY

THE HIGH COURT OF JUSTICE

AND ON APPEAL THEREFROM IN

THE COURT OF APPEAL

IN

NORTHERN IRELAND

McCORMICK v THE QUEEN'S UNIVERSITY OF BELFAST & ANOTHER[1].

Charitable trust—Property transferred to trustee for charitable purpose—Purpose not capable of being carried into effect at time of transfer—Trust subsequently proving impossible to perform—Resulting trust.

In 1946 the plaintiff transferred certain valuable securities to a university as an endowment for the maintenance of a house which the plaintiff's mother was then proposing to devise or convey to the university as a centre for extra-mural education. The plaintiff's mother died in 1954 without having so devised or conveyed the house which in fact passed to the plaintiff under her mother's will. The plaintiff thereupon offered to convey the house to the university but the offer was refused on the ground that it was not then economically possible to accept the gift for the purpose contemplated. The university desired to return the securities to the plaintiff, but doubts having arisen whether it had the power to do so an action was brought by the plaintiff for a declaration that she was entitled to have the securities re-transferred to her.

Held, that the securities had been transferred to the university for a specific charitable purpose and not with any general charitable intention, and as this specific charitable purpose never became capable of being carried into effect the university held the securities upon a resulting trust for the plaintiff, and that accordingly she was entitled to the declaration sought.

ACTION for a declaration that certain valuable securities transferred by the plaintiff to The Queen's University of Belfast were transferred conditionally upon the University accepting a gift of certain premises, and for the return of such securities.

[1] In the Chancery Division before McVeigh J.: Nov. 27, 28, 1957; Jan. 13, 1958.

In 1946 the plaintiff's mother, Mrs. Elizabeth Martha Anderson McCormick, formed the idea of leaving her house, known as Cultra House, to the Queen's University of Belfast as a centre for adult education and an approach was made to the University regarding this proposition. In the discussions between the plaintiff, her mother and the representatives of the University it became apparent that a fund to provide for the alteration and maintenance of the house would be required to make the scheme practicable, and the plaintiff thereupon agreed to provide a fund of approximately £7,000 for this purpose. It was accepted by the University that this fund was to be provided as an endowment for Cultra House, and not for any other purpose.

In March, 1947, the plaintiff transferred certain securities to the University to constitute the endowment, and as a contribution to the University's Centenary Endowment Fund, and on September 8, 1948, the University executed a deed poll relating to these securities. This deed poll, which had previously been approved by the plaintiff's solicitor, recited that the securities had been given by the plaintiff as a contribution to the Centenary Endowment Fund and declared that they were held by the University upon trust to invest and apply the income primarily for the University's Department of Extra-Mural Studies and subject thereto for such general purposes of the University as the Senate of the University might from time to time decide.

Subsequently the plaintiff's mother decided that she would convey Cultra House to the University in her lifetime and she thereupon bought another house in which she and the plaintiff could reside, but before this house was ready for occupation the plaintiff's mother died on May 3, 1954. By the terms of Mrs. McCormick's will Cultra House was devised, not to the University, but to the plaintiff. Shortly thereafter the plaintiff offered to convey the house to the University but the University decided that it would be impracticable for economic reasons to use the house for the purposes contemplated and therefore declined the offer. At the same time the University stated that it wished to return the securities to the plaintiff. The question having arisen whether the securities could lawfully be returned to the plaintiff in view of the fact that they were subject to a charitable trust the plaintiff brought this action against the University and the Attorney-General for the purpose of determining this question.

In her statement of claim the plaintiff asked for: (i) declarations that (a) the securities were transferred to the University conditionally upon the acceptance by the University of Cultra House, and (b) there

had been a breach of that condition; (ii) rectification of the deed poll of September 8, 1948, so far as might be necessary; (iii) an order for the return of the securities to the plaintiff.

Defences were filed by the University and by the Attorney-General. The defence of the Attorney-General contained the following averments:

"3. The terms of the Deed Poll.... were examined and approved "by the Plaintiff and her Solicitor.

"4. The Plaintiff was not a party to the Deed.

"5. The Plaintiff by her approval of the Deed is estopped from "alleging that the gift referred to therein was conditional.

"6. This Defendant will object that the parties to the transaction "cannot be restored to their original position.

"7. This Defendant will object that the funds the subject of the "Deed have vested for charitable purposes."

Patton Q.C. and *MacDermott* for the plaintiff.
Jones Q.C. and *Bowman* for the University.
Lowry Q.C. and *McConnell* for H.M. Attorney-General.

Cur. adv. vult.

McVeigh J.: The plaintiff in this action claims a declaration that certain valuable securities set out in the statement of claim and hereinafter called "the securities," transferred by her to Queen's University, Belfast, were transferred conditionally upon the said University accepting a gift of certain premises known as Cultra House in the County of Down, and she asks that the securities be returned to her.

The short history of this matter is that the plaintiff lived with her mother, Mrs. McCormick, who was a widow, in Cultra House which was owned by the mother; the plaintiff and her mother were very close to one another, they lived in complete harmony and the plaintiff helped her mother in her business affairs. In or about the year 1945 the mother spoke to the plaintiff about various ideas she was considering before making her will and one of these was as to the destination of Cultra House. Finally the mother decided to make an approach to Queen's University to find out if it would accept and use the house for adult education. In the year 1946 she asked her solicitor to make a confidential approach to the Vice-Chancellor of the University (then Sir David Keir) to see if such a proposition would be of interest to the University. This approach was made by letter dated

May 9, 1946. It led to the Vice-Chancellor and Professor Macbeath paying a visit to Cultra House in June, 1946, when they were shown over the house and grounds and when the project was discussed with the plaintiff and her mother. At this visit it was mentioned by the Vice-Chancellor that the matter would be viewed in a more hopeful light by the University if Mrs. McCormick could see her way to give a sum of £6,000 to £7,000 in addition to the house, but Mrs. McCormick said she was doing all she could. Shortly after that the plaintiff, who was about to receive a large legacy, decided to provide the necessary fund, about £7,000, and her decision was conveyed verbally to Professor Macbeath at a meeting with him early in November, 1946. Of this verbal communication Professor Macbeath says: "I had "no doubt that the money was an endowment for Cultra House and "not for any other purpose." That this was so appears to be borne out by the subsequent correspondence.

The plaintiff's stated intention in making the gift was "to enable "the Senate to accept my mother's gift. The situation presented itself "to me in this way—that without the money or without some assur- "ance about the money the Senate would not have accepted my "mother's house. She was very keen on this idea. It was to make her "wish possible that I did it."

It is only too plain in the correspondence between the plaintiff and representatives of the University that all parties concerned understood only too well that the securities were to be set aside as a fund for future use to alter, maintain and keep up Cultra House when taken over by the University for educational purposes.

The original idea of Mrs. McCormick was that she would bequeath the house by will to the University, but later she thought she would like to convey it in her lifetime, and in 1951 she bought a house known as Cultra Farm into which it was intended that the plaintiff and her mother would move, thereby leaving Cultra House vacant and available to be conveyed to the University. As it turned out, however, it became necessary to demolish and rebuild the house at Cultra Farm and in this operation there were delays, so much so that the house at Cultra Farm was not completed until November, 1955, Mrs. McCormick having died on May 3, 1954. Thus, it was not possible for Mrs. McCormick to move from Cultra House in her lifetime and convey the house to Queen's University. By her will she did not devise the house to the University, but devised it to the plaintiff with the proviso that if the plaintiff should predecease her or die within one month after the testatrix then it was to go over to Queen's University. The

plaintiff says she did not know that her mother had bequeathed the house to her, but she believed her mother was making some arrangement to ensure that the plaintiff could not be turned out of the house until she had somewhere else to live. The plaintiff says she "understood it to be her duty to release Cultra House at the earliest possible "moment." She added that she was surprised at the terms of the will.

On July 21, 1954, the plaintiff wrote to the present Vice-Chancellor indicating that she might be able to vacate Cultra House in six or seven months. Then on March 4, 1955, the Vice-Chancellor replied and stated that the University could not now discover any use for the house and would wish, in the event of the Senate not accepting it, to devise some way of offering back to the plaintiff the securities. From this point it became clear that the University was not prepared to accept Cultra House and equally clear that it wished to return to the plaintiff the securities. This is indeed an unhappy end to a most generous attempt to benefit the University, but both parties have behaved, as one might expect, in a most dignified way, recognising that the stern pressure of financial considerations compelled the Senate of the University to the embarrassing action which they had to take.

I think the words of the plaintiff in her letter to the Vice-Chancellor dated June 14, 1955, must sum up the feelings of all concerned in this matter—these words are: "I can't tell you how sad I feel about the "whole situation and I appreciate your consideration throughout "most sincerely."

The question which now arises is whether in these circumstances the University is at liberty, as it wishes to do, to return the securities to the plaintiff, and leave her free to devote them to such purpose as she may wish. It would seem nothing more than justice that it should be possible for the court to make an order providing for the return of the securities, and I may say that if my view of the case is correct I am of opinion that such an order can be made.

The defendant, Queen's University, whilst it has put in a defence to this claim, has, through its counsel, stated before me that it regards itself as stakeholder, and that its wish is to leave itself in the hands of the court. They also stated that their client was satisfied that the object of the plaintiff's bounty was directed strictly to the endowment of Cultra House and that the University was satisfied that there was no general charitable intention. If it was necessary, they conceded that the dead poll dated September 8, 1948 (hereinafter called "the "deed poll") which was executed in general terms declaring the trusts on which the securities were to be held should be rectified to show

what was the real intention of the gift. Indeed, since the time that it became apparent that the University did not wish to take over Cultra House its desire has been that the securities in question should be returned to the plaintiff as soon as possible. It would seem to anyone but a lawyer that this object could have been easily achieved by handing back the securities, but when the interests of charity might have been involved it would have been foolish and imprudent for the University to have so acted. The proper way to deal with this problem was to come before the court, as has been done, and to have the matter determined with due regard to the claims of the charity, such interest being protected by the Attorney-General who represents the Crown as *parens patriae* to enforce the execution of charitable trusts. "It has always been recognised as the duty of the law officers of the "Crown to intervene for the purpose of protecting charities and "affording advice and assistance to the Court in the administration "of charitable trusts": per Lord Macnaghten in *Wallis v. Solicitor-General for New Zealand*[1]. This duty was admirably discharged in this case by counsel for the Attorney-General.

So far as the defence of the Attorney-General contained in paragraph 3 is concerned it does not seem on his argument that the deed poll declaring the trusts upon which the University held the securities is of any relevance. Paragraph 4, it is admitted by counsel for the Attorney-General, does not raise a valid objection, and it is conceded that paragraphs 5 and 6 on the facts are not tenable. Paragraph 7 is intended, so it was stated, to draw out the distinction between such line of cases as is represented by *In re Peel's Release*[2], and the line of cases of which *In re University of London Medical Sciences Institute Fund*[3] is an example.

I am satisfied on the evidence in this case that the plaintiff in March, 1947, transferred the securities to Queen's University as an endowment to be used for the maintenance and upkeep of Cultra House if and when the said house was given to Queen's University for the purposes of the advancement of education. This seems to emerge clearly from the evidence of the plaintiff and Professor Macbeath, and I may say that I fully accept the evidence given by them in this matter. If corroboration was needed it is to be found in the correspondence opened and read in the course of the case.

The legal situation created by what passed between the plaintiff and the University up to the transfer of the securities in March, 1947

[1] [1903] A.C. 173, at 181-2.
[2] [1921] 2 Ch. 218.
[3] [1909] 2 Ch. 1.

is, in my opinion, what now determines the title to the securities. What had then taken place had created a trust of the securities for a charitable purpose, but for a purpose which had not then become capable of being carried into effect. This is how the matter was phrased by counsel for the Attorney-General, and I accept it as an accurate statement of the legal position as existing at March, 1947, and one which persisted until the time when it became apparent that the purpose for which the trust fund was held by the University was impossible of performance. In this view of the matter the deed poll is of no relevance because, the true trusts having been declared by what passed prior to the transfer of the securities in March, 1947, could not be altered or varied by anything subsequently agreed between the plaintiff and Queen's University. It is indeed doubtful to what extent the plaintiff agreed to the terms of the deed poll, but I am satisfied from the evidence that she did not see it, and I am also satisfied that she had not changed her mind in any way, even if she was at liberty to do so, as to the purpose for which the securities were given. Indeed, I accept that she asked her solicitor over the telephone, when the matter of the deed poll was mentioned to her, whether the deed was in order and if her wishes were safeguarded, and that he said they were safeguarded. It is my view that, although she did not expressly state her wishes, what she had in mind was that the securities had been transferred and were to be regarded as an endowment for Cultra House. I cannot think that anyone intended that the deed poll should abrogate what had been so clearly agreed upon by the plaintiff and the University, and I can only conclude that the plaintiff's solicitor was under the impression that what had already been agreed upon as to the securities was to be in some way read into the deed poll. I have little doubt that the trusts declared in this deed were those upon which the house was to be held and which were indicated in the letter of November 14, 1946. I do not, however, examine the strict legal effect of this deed poll on the asumption that it was within the power of the parties to make it.

Thus, as I have said, the securities were held in March, 1947, on a charitable trust which had not yet become capable of being carried into effect. That there can be such a charitable trust, that is, for something which has not yet become capable of being brought into effect, seems to be established by such cases as *Sinnett v. Herbert*[1]; *Chamberlayne v. Brockett*[2]; *Re Gyde*[3] (which also indicates that perhaps it would be wrong to regard the securities as having been

[1] (1872) L.R. 7 Ch. 232.
[2] (1872) L.R. 8 Ch. 206.
[3] (1898) 79 L.T. 261.

given on a condition precedent). I was also referred to the passage in Lord Macnaghten's speech in *Wallis v. Solicitor-General for New Zealand*[1] which reads: "But it is well settled, as stated in Tudor's "Charitable Trusts, 3rd ed. p. 53, that where there is an immediate "gift for charitable purposes, the gift is not rendered invalid by the "fact that the particular application directed cannot immediately "take effect, or will not of necessity take effect within any definite "limit of time, and may never take effect at all."

The charitable purpose for which the securities were given ultimately became impossible of performance whether by reason of the fact that Mrs. McCormick died without having given or bequeathed the house to Queen's University, or because the University for economic reasons deemed it impracticable to accept the house. Is the donor in those circumstances precluded from having the securities returned to her? She may be so precluded if there can be found in the gift by the plaintiff—

(a) a general charitable intention; or

(b) where the trust has already taken effect and cannot be carried on any longer.

As to (a) I do not find in the evidence any general charitable intention expressed. This was a gift for a specific purpose which never "got under way." It seems quite clear that the plaintiff only meant the trust to survive if her mother gave or bequeathed the house. As it was put "she was only giving the £7,000 because her mother was "giving the house." The paramount consideration moving the plaintiff in transferring the securities was to render practicable the desire of her mother and herself that Cultra House should be devoted to a charitable use, namely that it should be used by Queen's University for the advancement of education. In this state of affairs, and applying the guides indicated in *Re Good's Will Trusts*[2] and the cases reviewed therein, I have come to the conclusion that no general charitable intention is to be found in this gift.

As to (b) the point appears to be best covered by Farwell L.J. in his judgment in *In re University of London Medical Sciences Institute Fund*[3] where he says: "When money has once been paid over to the "trustees in the lifetime of the donor a complete trust is created, and "the money must be held on the trusts declared by the donor; the "right of the donor to a return of the money arises when the trust is "on the face of it contingent on the proposed institute being called

[1] [1903] A.C. 173 at 185-6.
[2] [1950] 2 All E.R. 653.
[3] [1909] 2 Ch. 1 at 8-9.

"into being." Thus, applying this principle to the present facts one would say that when the money was paid over to Queen's University in the lifetime of the plaintiff a complete trust was created and the securities were to be held as directed by the donor (the plaintiff) on the trusts declared by her, namely to be used as an endowment for Cultra House when given to the University and taken over by it. The plaintiff's right to have the securities returned arises when the trust is contingent on this happening. The contingency did not happen, the purpose for which the money was paid over wholly failed and in these circumstances the securities fall to be transferred to the plaintiff on a resulting trust.

The facts in the *London University* case[1] are very similar to those in the present case, the court being concerned with, firstly, subscriptions by living subscribers, and, secondly, a bequest by will to a fund for a charitable purpose which was found to be impracticable and was abandoned. It was held that the subscriptions were returnable to the donors and that the legacy was returnable to the executors of the testator who bequeathed it. It is true that the basis of the decision would appear to be that, in the words of Joyce J.[2], "there "was a condition implied and well understood by all parties which "cannot be fulfilled," or as put by Farwell L.J.[3]: "It is well settled "law that a legacy may be given to a charity upon a condition, which "condition may be express or implied, precedent or subsequent. I say "this because in argument it was suggested that there had been a "breach of trust; but I can see no breach of trust in the executors "having paid over this money upon a condition subsequent." It is true that these passages relate to the bequest by will and it is not clear if the same considerations applied in regard to the subscriptions. It would seem that the matter was there decided, so far as the legacy was concerned, on the basis of a condition subsequent by both Joyce J. and Farwell L.J.: see also per Chitty L.J. in *Re Gyde*[4].

For the plaintiff to argue her case on the basis of condition precedent or condition subsequent may lead her into difficulties because of the existence of the deed poll, a matter which did not complicate the decision of the *London University* case[1]. An argument based on a condition precedent may introduce the difficulty that the deed poll would govern the destination of the property if it was found as a fact that the plaintiff approved of it, or was to be taken as having approved of it; and an argument based on a condition subsequent may also

1 [1909] 2 Ch. 1.
2 Ibid. 4.
3 Ibid. 9.
4 (1898) 79 L.T. 261 at 265.

leave it open to the parties to alter the terms of the gift before the condition operates.

Had one been compelled to decide the case on either of these grounds, I would have been minded to order a rectification of the deed poll to bring it into conformity with what I consider to be the justice of this case. I need not, however, pursue these matters further, as I think one can decide this case on the principle enunciated by Farwell L.J. where he declares that[1] "when money has once been "paid over to the trustees in the lifetime of the donor a complete "trust is created, and the money must be held on the trusts declared "by the donor; the right of the donor to a return of the money arises "when the trust is on the face of it contingent on the proposed in-"stitute being called into being."

It seems to me that the conclusion at which I have arrived on this part of the case is supported by the recent "subscription" case of *In re Ulverston and District New Hospital Building Trusts*[2], where it was held that subscribers who gave money to a fund raised for the sole and exclusive purpose of building a new hospital at a certain place, there being nothing but the bare fact of the gift to indicate the intention, must be taken to have given the sum for that sole purpose and not with a general charitable intention, and that on failure of the particular purpose the money reverts to the donors on a resulting trust.

Accordingly, I shall make an order that the defendant, The Queen's University of Belfast, do transfer to the plaintiff the securities mentioned in the statement of claim or whatever is now represented by the securities and do pay to the plaintiff all the interest accrued thereon and received by the University.

As to costs, I have considered this matter, and it seems to me that if the case could have come before the court on a summons there would be little doubt that one would order the costs to be borne by the fund. I do not think any different rule should apply here where, although the plaintiff has been successful in the action, it is difficult to see any fair basis on which the University, having regard to the peculiar facts of this case, should be ordered to pay the costs or should be disallowed its costs.

Accordingly, I allow the costs of the Attorney-General, taxed as between solicitor and client, out of the fund, and I also allow the costs of the University on the same basis. I need say nothing about

[1] [1909] 2 Ch. 1 at 8-9.

[2] [1956] Ch. 622.

plaintiff's costs as she will receive the balance of the fund after the two sets of costs mentioned have been provided for.

Declaration and order accordingly.

Solicitors for the plaintiff: *G. L. MacLaine & Co.*
Solicitors for the University: *L'Estrange & Brett.*
Solicitor for the Attorney-General: *H. A. Maginess.*

J.P.

JEFFS v. DICKSON[1]
PRACTICE NOTE

Practice—Particulars—Action for personal injuries—Special damage—Loss of wages as substitute teacher—Particulars of previous earnings in that capacity.

In an action for damages for personal injuries sustained as the result of a road accident the plaintiff alleged in her statement of claim that she had lost 127 weeks' wages as substitute teacher at the rate of £13 15 0 per week and that such loss was continuing. The defendant applied by motion for particulars of the total earnings of the plaintiff as substitute teacher during the twelve months previous to the accident, and of her net earnings in that capacity after deduction of tax during the same period.

McVeigh J., who stated that his decision depended on the particular circumstances of the case, made the order sought. The basis of his decision was that the case was analogous in principle to *Field v. Catherwood Ltd.*[2], and therefore the onus was on the plaintiff to prove the loss in respect of which she claimed to be entitled to damages; the employment was by nature discontinuous, and the plaintiff's earnings in the previous twelve months were very relevant, since they would form the basis of a jury's assessment of loss of earnings, unless that period was shown to be an abnormal one.

J.P.

[1] In the Queen's Bench Division before McVeigh J.: Nov. 29, 1957.
[2] [1931] N.I. 150.

SHERRARD v. WOODS[1]

Motor vehicle—Motorist convicted and disqualified from holding or obtaining a driving licence—Order of petty sessions confirmed by quarter sessions—Application for removal of disqualification—Application to be made to petty sessions—Road Traffic Act (Northern Ireland), 1955 (4 & 5 *Eliz.* 2. *c.* 27), *s.* 57 (4).

Section 57 (4) of the Road Traffic Act (Northern Ireland), 1955, provides that "a person who by virtue of a conviction or order is disqualified from "holding or obtaining a licence may.... apply to the court before which he "was convicted or by which the order was made to remove the disqualifica-"tion...." Where a motorist is convicted and an order for his disqualification made at petty sessions, and the conviction and order are confirmed on appeal to quarter sessions, the court of quarter sessions is not "the court "before which he was convicted or by which the order was made" within the meaning of the section. Applications for removal of disqualification should be made to petty sessions notwithstanding that the conviction and disqualification were confirmed by order of quarter sessions.

CASE STATED by the Resident Magistrate sitting at Portrush Petty Sessions.

The facts and arguments are set out in the judgment of the Lord Chief Justice.

McConnell for the complainant and appellant.
Porter for the defendant and respondent.

LORD MACDERMOTT L.C.J.: This is an appeal by way of case stated from the decision of the resident magistrate sitting at Portrush petty sessions, who held that an application for removal of a disqualification from holding or obtaining a driving licence was properly before his court.

The case sets out that on February 20, 1957, the defendant was convicted at petty sessions of committing an offence under section 50 of the Road Traffic Act (Northern Ireland), 1955. He was ordered to pay a fine of £15 and costs; his licence was suspended for the remainder of its validity, and he was disqualified from holding or obtaining a licence to drive motor vehicles for a period of twelve months from the date of the adjudication, that is, from February 20, 1957. The offence with which the defendant was charged was one for which, on conviction, a minimum period of twelve months disqualification had to be imposed.

The defendant appealed to quarter sessions but the appeal was dismissed and the conviction and order at petty sessions were affirmed.

[1] In the Court of Appeal before Lord MacDermott L.C.J., Curran L.J. and Sheil J.: March 3, 1958.

The adjudication of the court of quarter sessions appears from the certificate of the Clerk of the Crown and Peace set out in the appeal book, which is in the following terms: "I certify that upon the hearing "of the said appeal on the 11th day of March, 1957, the Court of "Quarter Sessions ordered that said appeal be disallowed and "affirmed the conviction and order of penalty including the order of "suspension and disqualification of appellant's driving licence." So far as the record goes, then, what quarter sessions did was to affirm the conviction and order at petty sessions.

After a period of six months, the defendant applied to petty sessions at Portrush—the court at which he had been originally convicted—for the restoration of his licence. This application was made under section 57(4) of the 1955 Act, which provides:

> "A person who by virtue of a conviction or order is dis-
> "qualified from holding or obtaining a licence may. . . . apply to
> "the court before which he was convicted or by which the order
> "was made to remove the disqualification, and on any such
> "application the court may, as it thinks proper having regard to
> "the character of the person disqualified and his conduct sub-
> "sequent to the conviction or order, the nature of the offence
> "and any other circumstances of the case, by order either refuse
> "the application or remove the disqualification as from such
> "date as may be specified in the order. . . ."

Now, when the application came before petty sessions in October last, the complainant, the district inspector, indicated that he was not concerned to oppose the removal of the disqualification on the merits, but that he challenged the court's jurisdiction to entertain the application on the ground that it ought to have been made to quarter sessions, it being the order of that court, and not that of petty sessions, which made the defendant's disqualification effective.

The learned resident magistrate, however, came to the conclusion that the application was properly before him and the question for this court is whether he was right in so holding. In my opinion he was perfectly right and I think that the two points to which he draws attention in the case stated are sound and support his conclusion.

The first of those points is based on section 4(6) of the Motor Vehicles (Traffic and Regulation) Act (Northern Ireland), 1926, which made special provision for convictions that had been upheld on appeal. That sub-section (which has been replaced by section 57(4) of the 1955 Act) provided for the making of applications for the removal of disqualification and continued as follows:

"In cases where a conviction has been upheld on appeal, this "sub-section shall apply as if for references to the conviction and "the convicting court there were substituted references to the "decision given on the appeal and to the court by whom that "decision was given."

There is no similar provision in the 1955 Act and in that omission the resident magistrate found reason for thinking that Parliament no longer intended to extend the jurisdiction to include a court of quarter sessions which did no more than affirm a conviction at petty sessions. I think that specific provision in the 1926 Act is a clear indication that Parliament thought that, without it, a court of quarter sessions upholding a conviction on appeal would not have been the proper court before which to bring an application for the removal of a disqualification, as not being the court before which the defendant motorist had been convicted.

The resident magistrate also refers to the use of the word "con-"viction" in section 56 of the 1955 Act. That section provides that, in calculating the period of disqualification or the minimum period which must elapse before the removal of a disqualification, "any time "after the conviction during which the disqualification was suspended ". . . . shall be disregarded." This reference to suspension is a reference to the power to suspend a disqualification pending appeal conferred by section 57(2), and I find it very difficult to see how section 56 can be construed in any other way than as referring to the conviction at petty sessions where there has been an unsuccessful appeal. As I see it, that section would not work as respects suspensions if the word "conviction" meant the order of quarter sessions affirming a conviction.

But perhaps the most compelling reason for holding that the learned resident magistrate was right is to be found in a consideration of the machinery for appeal provided by section 24 of the Summary Jurisdiction and Criminal Justice Act (Northern Ireland), 1935. Section 24(3) (*i*) enacts:

"The court of quarter sessions may by its order confirm, re-"verse or vary the decision of the court of summary jurisdiction, "or may remit the matter to the court by which the decision "appealed against was given, with such declarations or directions "as to the court of quarter sessions may seem proper, or may "make such other order in the matter as it thinks just, and by its "order exercise any power which the court of summary juris-"diction might have exercised and any order made by the court

"of quarter sessions shall have the like effect and may be en-
"forced in the like manner as if it had been made by the court of
"summary jurisdiction;...."

And then in paragraph (*l*) of the same sub-section it is provided that:

"If it appears from any such certificate as aforesaid that the
"appeal has not been duly prosecuted or that the original order
"has been confirmed on appeal, the court of summary juris-
"diction which made the original order, or any resident magis-
"trate or justice of the peace having jurisdiction in the petty
"sessions district for which the last-mentioned court acted, shall
"issue the proper warrant for the execution of the original order
"as if no such appeal had been brought."

In other words, if the appeal is abandoned, or the order of the court of petty sessions affirmed, then the clerk of the crown and peace certifies accordingly and the proper warrant issues for the execution of the *original order*. Accordingly, when a conviction is affirmed on appeal I think it is reasonably clear that what happens is not that there is a new conviction, but that, at the conclusion of the appeal proceedings, the conviction at petty sessions takes effect.

In my opinion, on the true construction of section 57(4) of the Act of 1955, the court before which the defendant was convicted was the court of petty sessions, and therefore the application for the removal of his disqualification was properly made to that court.

Cases can arise, of course, in which the proper court to remove a disqualification will be quarter sessions. That, however, is not this case, and what I have said is directed only to those cases in which the conviction and order of petty sessions have been affirmed on appeal.

CURRAN L.J.: I agree and have nothing to add except to emphasise that we are dealing here with the case where quarter sessions merely affirms the order of petty sessions, and not with the case where the order is varied or where quarter sessions imposes a disqualification where none was imposed in the court below.

SHEIL J.: I agree, and see no reason why the words "conviction or "order" should have one meaning in sub-section (1) of section 57 and a totally different meaning in sub-section (4).

Appeal dismissed.

Solicitor for the appellant: *Chief Crown Solicitor.*
Solicitors for the respondent: *Wray & Baxter.*

S.M.M.

CONLON v. MURRAY & ANOTHER[1]

Contract—Specific Performance—Grounds for refusal of decree.

Though the court in the exercise of its discretion to grant or refuse a decree for specific performance does not act arbitrarily or capriciously, but on the basis of established principles, the cases in which relief may be refused do not fall into rigidly defined categories, and the court may refuse a decree if after regarding the conduct of the parties and all other circumstances of the case it considers in its discretion that relief ought not to be granted.

APPEAL from an order of Curran J. dismissing an action for the specific performance of a contract for the sale of a farm at Ballinarea in the County of Armagh.

The action arose out of an agreement made on May 26, 1954, whereby the plaintiff agreed to buy the farm from Mrs. Mary Sheridan for the sum of £2,000. Mrs. Sheridan died after the commencement of the action, which was continued against her executors. The defendants counterclaimed for the rescission of the contract.

The facts of the case, which are more fully set out in the judgment of Black L. J., were as follows.

Mrs. Sheridan, who was aged about 69 and in a poor state of health, owned the farm on which she resided with her brother. On May 24, 1954, as a result of a quarrel between Mrs. Sheridan and her brother Mrs. Sheridan left the farm, and late that night when she was wandering about in a distressed condition she met one Bernard Collins. Collins advised her to sell the farm and to go to live with her sister. He enquired whether she would sell the farm for £2,000 and said that if she would he would try to find a customer. The following night at 11 p.m. Collins brought the plaintiff to Mrs. Sheridan and a verbal agreement between Mrs. Sheridan and the plaintiff to sell the farm for £2,000 was concluded. Mrs. Sheridan stipulated that she wanted her own solicitor, Mr. O'Connor, to act for her in drawing up a formal agreement. The following day the plaintiff's brother went to fetch Mr. O'Connor, but as he was not available, he brought back Mr. O'Connor's managing clerk. The managing clerk drafted an agreement on information supplied by Mrs. Sheridan and this agreement was executed. The managing clerk was under the impression that he was acting for both parties, but though he interviewed Mrs. Sheridan alone he was not told of the quarrel between Mrs. Sheridan and her brother. The agreement contained provisions by which Mrs. Sheridan agreed to take all necessary steps to evict her brother from

[1] In the Court of Appeal before Lord MacDermott L.C.J., Black L.J. and Sheil J.: Jan. 29, 30, March 29, 1957.

the farm, and also to pay half the rates for the year ending March 31, 1955, although she was to give up possession on June 9, 1954. The agreement did not contain the usual provisions for forfeiture of the purchaser's deposit or for right of re-sale in the event of the purchaser defaulting.

At the hearing of the action Curran J. found that though the farm was probably worth more than £2,000 that sum was not a gross undervalue. After a review of the facts the learned judge concluded: "In my opinion the circumstances disclosed in the evidence place the "onus on the plaintiff of establishing that he did not take an undue "advantage of Mrs. Sheridan in obtaining the agreement he seeks to "enforce. He must prove that everything has been right and fair and "reasonable on his part. The conclusion I have arrived at is that the "plaintiff has not discharged this onus of proof." He therefore refused a decree of specific performance, and dismissed the action and counterclaim. The plaintiff thereupon appealed to the Court of Appeal.

Nicholson Q.C. and *Kelly* for the appellant. When the court is asked to refuse specific performance of a valid contract the onus is on the defendant to establish the circumstances to justify relief: see Halsbury's Laws of England (Hailsham Edition), vol. 31, pp 366-7 and *Broughton* v. *Snook*[1].

[Lord MacDermott L.C.J. That was a Statute of Frauds case.]

The principle is of general application, as is recognised by Lord Eldon in *Townshend v. Stangroom*[2], where the ground was surprise or mistake. The learned trial judge introduced the wrong principle when he stated that the onus was on the plaintiff.

[Black L.J. Even if that be so, the application of the right principle might not be in favour of your client.]

We say that no sufficient grounds were shown upon which relief from the performance of the contract can be granted. There was no fraud, mistake, surprise or grave hardship upon which to found the exercise of the discretion. That discretion may be exercised only upon established principles: *Falcke v. Gray*[3], per Kindersley V.C., and in accordance with fixed and settled rules; nor can it be exercised on merely a consideration of what is fair between the parties: *Haywood v. Cope*[4], where Romilly M.R. states the rule as follows[5]: "I will

[1] [1938] Ch. 505, 513.
[2] (1801) 6 Ves. 329, 338.
[3] (1859) 4 Drew. 651, 659.
[4] (1858) 25 Beav. 140.
[5] Ibid. 151.

"refer again to a passage which I have always considered binding "upon me, for it is most important that the profession, and those who "have to advise in reference to this subject, should understand the "rule which is adopted in this and the other Courts, which is, that the "discretion of the Court must be exercised according to fixed and "settled rules; you cannot exercise a discretion by merely considering "what, as between the parties, would be fair to be done; what one "person may consider fair, another person may consider very unfair; "you must have some settled rule and principle upon which to de- "termine how that discretion is to be exercised." See also Fry on Specific Performance, 6th ed., pp. 19-20, adopted by Astbury J. in *Holliday v. Lockwood*[1]:

[BLACK L.J. Is the onus of proof so important in this case?]

We submit that it is, and that since the learned trial judge was wrong in his decision as to the onus of proof it is open to this court to interfere with the exercise of his discretion.

Twining v. Morrice[2] is the strongest case in support of the defendant's view, but properly understood it is a case of surprise. It concerned a sale by public auction, and in such sales any irregularity is regarded as a fraud on the public. The relief there given was on the basis of surprise on third parties: *Townshend v. Stangroom*[3]. Lord Eldon considered it to be an exceptional case: see *Mortlock v. Buller*[4]. All the other cases in which a decree has been refused fall into some recognised category and show some element of surprise, mistake, misrepresentation or grave hardship. We rely on the judgment of Jessel M.R. in *Leech v. Schweder*[5]. [They also referred to *Lightfoot v. Heron*[6] and *Dering v. Winchelsea*[7].]

Harrison Q.C. and *Reid Q.C.* for the respondents. There are two issues of law involved in this case, as to the onus of proof and as to the principles upon which equitable relief is refused.

The appellant has failed to apply the correct principle on the question of onus of proof, in that his argument overlooks the finding of fact that the circumstances showed an inequality between the parties. We say that such a finding should not be set aside unless plainly wrong. The jurisdiction to do so is only exercised on very rare occasions: see *Powell v. Streatham Manor Nursing Home*[8] per Lord Wright. The learned trial judge found that in the circumstances one

1 [1917] 2 Ch. 47, 56-7.
2 (1788) 2 Bro. C.C. 326.
3 (1801) 6 Ves. 329, 338.
4 (1804) 10 Ves. 292, 313-4.
5 (1874) L.R. 9 Ch. 463, 467.
6 (1839) 3 Y. & C. 586.
7 (1787) 1 Cox. 318.
8 [1935] A.C. 243, 263-4.

of the parties was in a position of weakness arising from the circumstances, and where such weakness has been prima facie established the other party must rebut the presumption and prove that the transaction has been fair and reasonable: see *Aylesford v. Morris*[1] per Lord Selborne L.C. This is not a matter of common law deceit or fraud, but of taking advantage of relative weakness due to circumstances. Lord Selborne refers to "all other cases where influence, "however acquired, has resulted in gain."

Accordingly, if there was a question as to onus of proof the learned trial judge directed his mind to it and the court should not interfere. In any case, there was ample evidence to support the view which he took.

On the question of the scope of the relief we refer to Fry on Specific Performance, 6th ed., pp. 185, 199. Equitable relief may be refused even though there has been no improper conduct on the part of the plaintiff, and even though the evidence fails to bring the case into one or other of the clearly recognised categories; it is enough if the case is shown to be partly in one such category and partly in another, provided that the facts as a whole would make it inequitable to grant the relief sought. See *Twining v. Morrice*[2]. [They also referred to *Clark v. Malpas*[3] and *Permanent Trustee Company of New South Wales Ltd. v. Bridgwater*[4].]

Nicholson Q.C. in reply. The equitable principle that the stronger party must justify the righteousness of any transaction applies to reversioners, expectant heirs and others where a fiduciary relationship is established. *Aylesford v. Morris*[1] does not extend this principle to other situations of inequality until an unconscientious use of power is proved. In a case like the present the onus remains on the person resisting performance to establish equitable fraud. There was no element such as gross undervalue to establish such fraud. If performance is refused it can only be on some vague and undefined basis of unfairness and this is directly contrary to authority: per Romilly M.R. in *Haywood v. Cope*[5].

Cur. adv. vult.

LORD MACDERMOTT L.C.J.: I have read the judgment which Black L.J. is about to deliver and I am in agreement with him.

BLACK L.J.: This is an appeal by the plaintiff Patrick Conlon from the dismissal by Curran J. on July 30, 1956, of an action in which

[1] (1873) L.R. 8 Ch. 484, 490-1.
[2] (1788) 2 Bro. C.C. 326.
[3] (1862) 4 De G. F. & J. 401.
[4] [1936] 3 All E.R. 501.
[5] (1858) 25 Beav. 140, 151.

the plaintiff claimed specific performance of an agreement in writing dated May 26, 1954, by which one Mary Sheridan agreed to sell to the plaintiff for the sum of £2,000 the farm on which she lived situated at Ballinarea in the southern part of Co. Armagh. Mary Sheridan died on September 22, 1955, and the action was continued against James Murray and Peter Murray her executors.

At the time of signing the agreement Mary Sheridan was about 69 years of age. According to the evidence of her medical attendant Dr. O'Reilly, which was not challenged, her eyesight had been troubling her. She had had an operation on her left eye which necessitated the use of glasses and in her right eye she had no sight at all owing to glaucoma which is associated with increasing pressure of fluid in the eye. This condition was acute and according to Dr. O'Reilly was probably quite painful. Dr. O'Reilly saw her on May 24, 1954. She then also complained of bleeding from the womb. That suggested to Dr. O'Reilly the probability of something malignant and he arranged for her to be treated by a specialist gynaecologist. She was seen by the specialist at Newry Hospital on June 1, she was admitted to the hospital on June 7, and her womb was removed on June 18. She was discharged from hospital on July 14, and readmitted on July 18, with an acute urinary infection. She was allowed home on the 1 or 2 August, but entered a nursing home on August 6, where she remained until her death on September 22, 1955. Dr. O'Reilly says that in May 1954 her uterus trouble was fairly advanced and that it would be distressing with constant bleeding and general weakness due to carcinoma. She was ill and was generally weak but was mentally alert at any time he saw her apart from the effect of drugs given to relieve her pain.

Mrs. Sheridan had a brother called Patrick Toner who had sold his own farm in 1953 and had come to live with her in the house on her farm. He was a man somewhat addicted to drink and had become rather a trial to Mrs. Sheridan. It appears that on May 24, 1954, the same day as she had been seen by Dr. O'Reilly, Mrs. Sheridan arrived sometime between 4.30 p.m. and 6 p.m. at the house of a Mr. Michael Sheridan. She had had a row that day with her brother and according to Michael Sheridan's daughter Miss Mary Sheridan, a trained nurse, she was not terribly distressed, but when she arrived she was slightly distressed but settled down. Mrs. Sheridan asked Miss Mary Sheridan would she go when it got dark to Cullyhanna and get her brother's car and take Mrs. Sheridan to the house of her sister Mrs. Murray. Miss Mary Sheridan cycled over to Cullyhanna but was unable to get

her brother's car as he had the engine down cleaning it. She then went to Mrs. Murray's house and they both came over to Mr. Michael Sheridan's house on their bicycles. When they arrived there about 10.30 p.m. Mrs. Sheridan was missing and Mrs. Murray went out to look for her. Mrs. Murray found Mrs. Sheridan in one of her own fields going in the direction of her own home with no coat or hat. They came up to the road where they met a man called Bernard Collins who plays a not unimportant part in the case and had a conversation with him. Eventually Mrs. Sheridan agreed to go back home to Mrs. Murray's house—a distance of 3 miles away—where they arrived about 1.30 a.m. Collins agreed that Mrs. Sheridan was worried that night and that although it was late she had no coat on.

The details of the conversation with Collins on the road on the night of Monday, May 24, are in dispute. According to Collins' own story Mrs. Sheridan said that she had had a dispute with her brother Paddy and that he had thrown a bucket of water round her. Collins then, according to his story, advised her to go and live with Mrs. Murray and to put up the farm for sale and asked her if she would be willing to take £2,000 for the farm and, if so, he would try to get her a customer. Mrs. Sheridan, according to Collins, said that she would indeed be willing to take £2,000 and would give Collins a good shakehand and the purchaser a good luckpenny. Collins said that he himself meant to be the customer for the farm but when he saw his wife he decided not to buy and then thought of the plaintiff Patrick Conlon as a possible purchaser. Accordingly, Collins sought to get in touch with the plaintiff next day (Tuesday, May 25). The plaintiff, however, was at Ardee Fair but Collins left a message for him and the plaintiff went over to Collins' house about 7 p.m. As a result they went over to Mrs. Murray's house to interview Mrs. Sheridan. This was quite late at night. Collins says about 11 p.m. Collins apparently got there first and went up to see Mrs. Sheridan who was in bed. According to his account Mrs. Sheridan was at first averse to selling to Conlon on personal grounds but ultimately said that Conlon's money was as good as any other man's, that she was getting a good price and it was no odds who got it. Conlon was then brought up to the bedroom and according to him Mrs. Sheridan and he agreed to the sale of the farm for £2,000. There was then some discussion about getting a solicitor to draw up the agreement. Mrs. Sheridan stipulated that she wanted her own solicitor Mr. O'Connor of Crossmaglen. It is agreed that on the night of May 25 there was no talk of Conlon getting vacant possession of the lands or what was to be done about Mrs. Sheridan's brother being in the house.

No time was wasted about getting the agreement reduced to writing. On the morning of Wednesday, May 26, Gerard Conlon a brother of the plaintiff, went into Crossmaglen for Mr. O'Connor. Unfortunately Mr. O'Connor was in Dublin that day but his managing clerk Mr. Carahar was in the office and was apprised that his services were required for the purpose of drawing an agreement for the sale of a farm. Apparently there was no question of waiting until Mr. O'Connor himself should be available. Gerard Conlon got a taxi and drove out with Mr. Carahar to Mrs. Murray's at Cullyhanna, stopping by arrangement about 20 yards past the house. The plaintiff was already there in the kitchen of Mrs. Murray's house. Mr. Carahar was shown up to Mrs. Sheridan's bedroom. Up till then Mr. Carahar had not seen the plaintiff although apparently even up to the trial he was under the impression that the man who had called for him and had taken him out in the taxi was not a brother of the plaintiff but the plaintiff himself. At Mrs. Sheridan's bedside Mr. Carahar proceeded to draft the agreement upon the information given to him by Mrs. Sheridan who was sitting up in bed propped up by pillows. Carahar says that he pointed out to Mrs. Sheridan what was to happen her when she had disposed of her home and she replied that she could live anywhere. Mr. Carahar did not appear clear for whom he was supposed to be acting when he was drafting the agreement. He had been brought out to Mrs. Murray's house by an emissary of the plaintiff's and although Mrs. Sheridan in the past had been a client of Mr. O'Connor's Mr. Carahar had not been informed that he was to be regarded as acting on her behalf. There would seem little doubt, however, but that Mrs. Sheridan regarded Mr. O'Connor as her solicitor and had asked for him for that reason and accordingly would consider Carahar as looking after her interests in the matter. Mr. Carahar says that Mrs. Sheridan did not ask for any advice, that he pointed out she was disposing of her home, that she told him she had got a good price for it and that he did not suggest that an auction might bring a better price. Mr. Carahar says his state of mind was that he might be acting for both parties and thought it his duty to look after both Conlon's and Mrs. Sheridan's interests. Conlon conveyed to Mr. Carahar that he wanted the contract signed there and then. And Conlon paid for the taxi.

The real difficulty in drafting the agreement was in regard to giving possession of the farm. What was to be done about Toner? Mr. Carahar says that he told Mrs. Sheridan that she should get her brother to leave as it was her duty to give clear possession and that she did not dispute that but said that she had rather not take pro-

ceedings against him. Mr. Carahar says she meant that she would rather the purchaser did it and that she said there would be no trouble with her brother. She believed he would leave when asked and she instructed Mr. Carahar to write him immediately informing him of the sale and asking him to leave. Mr. Carahar then apparently added Clause 9 of the agreement which reads: "The said Mary Sheridan "agrees to take all steps necessary to evict said Patrick Toner if he "refuses to leave said dwellinghouse and to pay costs of same." Mr. Carahar says that he did not speak to Conlon before he put in this clause and that he put it in to protect Conlon. In so doing Mr. Carahar was, of course, acting in Conlon's interest though it is tolerably clear that Mrs. Sheridan was looking upon him as acting on her behalf. In view of the circumstances and of what were obviously Mrs. Sheridan's strong feelings in the matter I think that if an independent solicitor had been acting upon behalf of Mrs. Sheridan he would have struggled hard to negotiate a modification of this clause. Mr. O'Connor himself frankly says that he would agree that in this aspect of the matter she would require independent legal advice and says that he would have taken proper instructions and advised her and such advice would be independent of any obligation to the purchaser.

Mr. Carahar says that he read the agreement to Mrs. Sheridan and she approved it. He then brought Conlon into the room and read it over again in his presence and he approved and said he was paying £500 deposit which he paid then and there in cash.

Conlon's account of the transaction is substantially different. He says that Mr. Carahar called him up to Mrs. Sheridan's bedroom after he had part of an agreement drawn up, that the clause about possession had not yet been inserted, that next they talked about possession of the house and Carahar asked him would he take it on him to put Toner out of the house. Conlon says he said "No" as he earned the first shilling he ever earned with Paddy Toner and he would not be the man to put him out, that Mr. Carahar then said to Mrs. Sheridan "You see the situation now?" and that he, Conlon, then said he wasn't putting him out and the deal was off. Conlon says that Mrs. Sheridan then said: "Seeing you won't put him out Paddy, I'll have to put him out," and she proposed that if Conlon put him out she would bear the expenses. Conlon says he would not agree, so she agreed she would put him out in her own name.

Whether Carahar's account of this matter or the plaintiff's is the true one I have no means of knowing. Both were called as witnesses for the plaintiff. On another point, where the plaintiff's evidence

differed from Carahar's, Curran J., who had the advantage of seeing the witnesses, roundly held that he was satisfied that the plaintiff was not telling the truth. But he did not find it necessary in his judgment to assess where the truth lies on any other particular point.

It is obvious from Mr. O'Connor's evidence as regards his visit to Mrs. Sheridan on May 31 that Mrs. Sheridan fully appreciated that she had entered into an agreement to sell the farm to Conlon and that she was to put her brother out. This was apparently the term of the agreement that she particularly objected to and the term which on May 31 she felt to impose particular hardship on her.

The remedy of specific performance still retains the character of an equitable remedy. It is not granted as of right but is a discretionary remedy which may be withheld in cases of a type where the court, having regard to the conduct of the parties and all the circumstances of the case, considers in its discretion that the remedy ought not to be granted. This discretion is not, of course, the arbitrary discretion of the individual judge but is a discretion to be exercised on the principles which have been worked out in a multitude of decided cases. And it is well established that there is a class of cases in which a contract may be such and entered into in such conditions that the court will not order it to be rescinded but, at the same time, looking to the substantial justice of the case, will not order it to be specifically performed. It follows naturally, as observed in Kerr on Fraud and Mistake, 7th ed. (1952) p. 568 that when the aid of a court is sought by way of specific performance of a contract the principles of ethics have a more extensive sway than when a contract is sought to be rescinded.

In the present case Mrs. Sheridan was 69 years of age and, although admitted to be mentally alert and vigorous, was suffering from two painful and weakening ailments. It is not surprising that after the trouble with her brother she should have an impulse to get rid of the responsibility of the house and the farm and express a readiness to sell it. This might prove a mere transitory mood or it might not. But the idea of selling the farm raised questions requiring deliberation and reflection. If the treatment which she might have to undergo was successful (and for all that she then knew it might have been) where was she to go to live when she came out of hospital? And what was to happen to her brother? Where was he to go to live if the farm was sold? Both of these were matters which required thoughtful and anxious consideration. But neither seems to have been mentioned or considered when the bargain was made in Mrs. Sheridan's bedroom

on the night of May 25 and, whether one accepts Carahar's evidence or Conlon's, the question of what was to happen to the brother was not even raised until the agreement was actually being drafted by Carahar on the morning of May 26. The truth of the matter seems to be that in her plight on the night of May 24 the plaintiff impulsively accepted Collins' suggestion that she should sell her farm and that Collins and Conlon both recognised that this mood might well prove to be a transitory one and that if Conlon was to get the farm it behoved them to obtain Mrs. Sheridan's signature to a document without delay. Conlon seems to have first heard of the opportunity from Collins about 7 o'clock on the evening of May 25, and at 11 p.m. on the same evening—a peculiar hour for legitimate business—they visit Mrs. Sheridan in her bedroom and the bargain is made for the sale of the farm to Conlon at £2,000—the figure mentioned by Collins the previous night—without any higgling or negotiation and without any mention of when possession would be given or that it would be necessary to put Toner out. Then on the next morning Mr. Carahar is brought out in a taxi paid for by Mr. Conlon to draft the necessary agreement. The reason why Mr. Carahar is brought is because Mrs. Sheridan regards Mr. O'Connor as her solicitor. But conceiving himself as being there as much in the interests of Mr. Conlon as of Mrs. Sheridan he inserts on his own volition (if his evidence on this point is to be accepted) a special clause in the agreement for the benefit of Conlon. I quite appreciate that specific performance of a contract will not be refused on the sole ground that one of the parties had not legal advice. A man can enter into a binding contract without having his solicitor at his elbow. But as Mr. O'Connor observed in his evidence, Mrs. Sheridan should have had independent legal advice in a transaction of this kind. And quite apart from any other consideration the way in which Mrs. Sheridan's expression of her willingness to sell the farm was jumped at by Collins and Conlon and the extraordinary and unexplained haste with which the transaction was rushed through raise of themselves such a degree of suspicion as would lead a court of Equity to be hesitant about granting specific performance of a contract concluded in such circumstances.

It was argued on behalf of the plaintiff that cases in which equity refuses the remedy of specific performance fall within one or other of certain defined categories. I cannot accept this view. Certainly equity acts on certain broad and ascertained principles but it has always refused to be forced into rigid categories. This is, I think, well stated in Story's Equity Jurisprudence 10th ed. (1870), vol. 1, p. 739: "In

"truth the exercise of this whole branch of equity jurisprudence re-
"specting the rescission and specific performance of contracts is not a
"matter of right in either party; but it is a matter in the discretion of
"the Court, not indeed of arbitrary or capricious discretion, de-
"pendent upon the mere pleasure of the judge, but of that sound and
"reasonable discretion which governs itself so far as it may by
"general principles; but at the same time which witholds or grants
"relief according to the circumstances of each particular case, when
"these rules and principles will not furnish any exact measure of
"justice between the parties. On this account it is not possible to lay
"down any rules and principles which are of absolute obligation and
"authority in all cases; and, therefore, it would be a waste of time to
"attempt to limit the principles, or the exceptions, which the com-
"plicated transactions of the parties and the everchanging habits of
"society may at different times and under different circumstances
"require the Court to recognise or consider." A good instance of a case which it would be found difficult to fit into any of the suggested categories in which specific performance will be refused is the case *Twining v. Morrice*[1] referred to in the course of the hearing.

I am accordingly of opinion that Curran J's judgment refusing the plaintiff's claim for specific performance should be affirmed.

SHEIL J.: I have found this case a very difficult one, one which is very near the border line, but after full consideration I am not prepared to differ from the conclusions at which my Lords have arrived.

Appeal dismissed.

Solicitors for the appellant: *Thomas Elliott & Son.*
Solicitors for the respondent: *Fisher & Fisher.*

J.P.

[1] (1788) 2 Bro. C.C. 326.

IN RE SCARLETT[1]

Charity—Will—Bequest of residue to charity—Death of testator within three months—Sale of lands by testator—Sale uncompleted at death of testator—Unregistered transfer—Equitable estate in purchaser—Charitable Donations and Bequests (Ireland) Act, 1844 (7 & 8 *Vict. c.* 97), *s.* 16—*Local Registration of Title (Ireland) Act*, 1891 (54 & 55 *Vict. c.* 66), *s.* 35.

A testator who was registered as owner in fee simple of a farm which had been purchased under the Land Purchase Acts by his will directed his executor to give J. an option to purchase the farm, and in the event of the option not being exercised to sell it. After providing for certain pecuniary legacies the testator bequeathed the residue of his estate to three charitable institutions. Subsequent to the making of the will the testator entered into a contract for the sale of the farm to J. who paid a deposit and entered into possession, but the sale was not completed nor was the transfer registered until after the date of the testator's death which occurred within three months of the execution of the will. The next-of-kin having claimed that the residuary bequests to the three charities failed in so far as they consisted of the residue of the purchase money from the sale of the farm by reason of section 16 of the Charitable Donations and Bequests (Ireland) Act, 1844,

Held, (i) that notwithstanding that the transfer had not been registered at the date of the testator's death, the purchaser had acquired an equitable interest in the land so extensive as to leave the testator no beneficial interest which could be accounted an "estate in lands" for the purposes of section 16 of the Charitable Donations and Bequests (Ireland) Act, 1844;

(ii) that even if the testator died possessed of any beneficial estate in the land, such estate was held by the executor in trust, not for the residuary legatees, but for the purchaser.

APPEAL from a decision of McVeigh J. on the hearing of an originating summons.

The testator, William Scarlett of Lislaris, Newtownbutler, County Fermanagh, by his last will dated July 16, 1956, appointed the plaintiff, George Trotter, as his sole executor and directed him "To give "William J. Johnston of Legmacaffrey, Newtownbutler, the option "of purchasing my farm of land in Lislaris on which I reside and "which is now let to him in conacre, at the sum of £1,650." The testator provided that this option was to be exercised within six months of his death and directed his executor, in the event of the option not being exercised, to sell the farm. After providing for certain pecuniary legacies the testator bequeathed the residue of his estate of every nature and kind to three charitable bodies, two of which carried on their activities outside Ireland.

[1] In the Court of Appeal before Lord MacDermott L.C.J., Curran L.J. and Sheil J.: Dec. 9, 10, 11, 12, 13, 1957: March 10, 1958.

On July 21, 1956, the testator entered into a contract with the said William J. Johnston for the sale of the farm for the sum of £1,650. The conditions of sale provided that a deposit of £400 should be paid on the execution of the contract. The testator died on August 3, 1956, within three weeks of making his will. At the time of the testator's death the sale of the farm was not completed though the deposit had been paid. The farm had been purchased under the provisions of the Land Purchase Acts and as such was compulsorily registrable under the Local Registration of Title (Ireland) Act, 1891. The first registration took place in March 7, 1934, and the testator remained registered as owner in fee simple from then until his death. Subsequent to the testator's death the sale was completed and the plaintiff held the proceeds of sale as executor.

The present proceedings were instituted by the plaintiff by originating summons to determine the two questions:

(i) whether the gifts made by the deceased to the residuary legatees were valid charitable bequests;

(ii) whether the residuary bequests failed in so far as they consisted of the residue of the purchase money arising from the sale of the farm.

On the hearing of the summons McVeigh J. answered the first question in the affirmative, and this decision was not appealed from. McVeigh J. answered the second question in the negative, and from this decision the next-of-kin appealed to the Court of Appeal.

Lowry Q.C. and *Clarke* for the appellants. The next-of-kin claim that the residuary gifts to charity are caught by the operation of section 16 of the Charitable Donations and Bequests (Ireland) Act, 1844. The testator died within three months of making his will and at the date of his death the sale of his farm had not been completed. No doubt a purchaser generally has an equitable estate but it cannot be said that the testator had no estate in the lands at the date of his death. It is well settled that a trust for sale will not take the estate out of the operation of section 16 and that the doctrine of conversion does not apply to save gifts of land to charities.

In any event this was registered land and it was not possible for any interest to pass inter vivos until the transfer was registered. This was clearly pointed out by Cherry L.J. in *Mooney v. M'Mahon*[1] who said that if section 25 of the Local Registration of Title (Ireland) Act,

[1] [1911] 1 I.R. 125.

1891, prevents the passing of the estate by conveyance without registration, a fortiori it cannot pass as the result of a mere executory agreement for sale. What the law is directed to preventing is the giving by will of any legal or equitable estate in lands to charity, and there is a wealth of authority to show that land given to an executor on trust to sell it and give the proceeds to charity becomes the subject of an equitable estate in the charity.

Section 25 applies only to conveyances of land, the registration of which is compulsory, dated before the completion of first registration. Transfers of registered land are governed by section 35, but both sections operate on the same principle, and decisions on either section are relevant so far as the general application of section 16 of the 1844 Act is concerned. *Sherlock v. Blake*[1] was an instance of a trust for sale. In *Torish v. Orr & Smith*[2] it was held that until registration had taken place a grantee of freehold registered lands was not entitled to the franchise. *M'Gettigan v. Roulstone*[3], another franchise case, seems to be clearly a section 35 case but only section 25 is mentioned in the judgment. *In re Byrne*[4] is a useful case to show how the Supreme Court in the Irish Free State regarded *Sherlock v. Blake*[1] and applied section 16 in circumstances where a mixed fund had been created for the payment of legacies, some of which were charitable and some non-charitable.

The decision of *Mooney v. M'Mahon*[5] was only partly based on *Pim v. Coyle*[6]. In that case, which was considered to be a decisive authority by Cherry L.J., it was held that there could be no relation back under section 35. Subsequent to the decision in *Mooney v. M'Mahon*[5], *Pim v. Coyle*[6] was criticised on the ground that the Local Registration of Title (Ireland) Act, 1891, did, by section 44, make provision for the recognition of unregistered rights, including estates: *Devoy v. Hanlon*[7]. The difficulties which may arise under this type of law are not peculiar to Ireland: see *Macedo v. Stroud*[8].

In *Mooney v. M'Mahon*[5] the Master of the Rolls said that the question of conversion did not arise, with which view Cherry L.J., delivering the judgment of the court, agreed. "The equitable doctrine "of conversion has its root in this simple principle that when property "has been given to a trustee it must not be in the power of that "trustee to alter the devolution of the beneficial interests by com- "mitting a breach of trust": Maitland, Lectures on Equity, p. 215.

1 (1864) 10 Ir. Jur. N.S. 350.
2 [1894] 2 I.R. 381.
3 [1910] 2 I.R. 17.
4 [1935] I.R. 782.
5 [1911] 1 I.R. 125.
6 [1907] 1 I.R. 330.
7 [1929] I.R. 246.
8 [1922] 2 A.C. 330.

At p. 216 the learned author, however, says "the doctrine was found "a convenient one and was extended beyond the simple principle in "which it has its origin."

Sherlock v. Blake[1] and *In re Byrne*[2] are examples of equitable conversion, but no principle of equitable conversion can be invoked to save property which is affected by the operation of section 16. Leaving the registration point out of account for the moment, the position of the charity can be no stronger where a sale takes place before death than in the case of a trust for sale; *Donnellan v. O'Neill*[3]; *In re O'Connor*[4]. The converse case of a bequest of money for the purpose of building a church was held not to be affected by section 16: *Pollock v. Day*[5].

So far as the words "in Ireland" in section 16 are concerned, it is, in the first place, obvious that the lands must be in Ireland in order to come within the ambit of the section. In the present case two of the charities named as beneficiaries appear to operate outside Ireland, but it is submitted that the words "in Ireland" do not refer to the activity of the charity but to the whole preceding phrase—"donation, "devise or bequest for pious or charitable uses": *Boyle v. Boyle*[6]. The opposite view appears to have been taken in *Re Brown*[7], but *Boyle v. Boyle*[6] was approved in the later cases of *In re Knox*[8] and *M'Dermott v. Anderson*[9].

Gibson Q.C. and *MacDermott* for the respondents. Apart from the effect of the 1891 Act, the position at the testator's death was that the lands belonged in equity to the purchaser and the vendor had a lien for the balance of the purchase money.

When a contract for sale is effected the purchaser acquires not merely contractual rights, but an estate in the land which is assignable and chargeable: *Paine v. Meller*[10]. Apart from the vendor's right to possession or to the rents and profits he has no equitable estate in the lands. The question of the right of the vendor to rents and profits can be excluded from the present case, as the purchaser was already in possession of the lands as a conacre tenant and he was entitled to go into possession of the dwelling house within fifteen days of the agreement. The vendor's lien for unpaid purchase money is not an "estate" in land within the meaning of section 16. *In re Stucley*[11] would appear

1 (1864) 10 Ir. Jur. N.S. 350.
2 [1935] I.R. 782.
3 (1870) I.R. 5 Eq. 523.
4 [1922] 1 I.R. 139.
5 (1863) 14 Ir. Ch. R. 371.
6 (1877) I.R. 11 Eq. 433.
7 (1900) 35 I.L.T.R. 25.
8 [1910] 1 I.R. 20.
9 [1915] 1 I.R. 191.
10 (1801) 6 Ves. Jun. 350.
11 [1906] 1 Ch. 67.

at first sight to be against the residuary legatees, but under the English Mortmain Acts the word "interest" is used and not the word "estate". *In re Beirnstein*[1] emphasised the essential distinction between a mortgage and a vendor's lien. *Stewart v. Barton*[2] and *Murland v. Perry*[3] established that a charge or lien is not an estate in the land so as to be caught by section 16.

The 1891 Act established a register of freeholders and section 34(1) provided that the register was to be conclusive of ownership, but it is only conclusive of the existence of rights or estates which must or may be registered. The register is not conclusive of equitable rights affecting the lands. So far as registered land is concerned it is essential to bear in mind the fundamental distinction between an uncompleted transfer by way of gift and one for valuable consideration. Section 35 provides that "until the transferee is registered as owner of the land "transferred that instrument shall not confer on the transferee any "estate in the lands." What the Act does *not* say is that the transferee may not have an estate apart from that conferred by the transfer. It deals with the effect of instruments; not of transactions. Equitable estates are expressly kept off the register: see section 29(3). Trustees, for instance, may be registered, and, if registered, they appear as if they were beneficial owners—sections 30(4) and 63. By section 36(1) a voluntary transferee becomes entitled to be registered as owner but takes subject to all unregistered rights to which the transferor was subject. That seems to imply that a transferee for value is not so subject. "Rights" are defined by section 95 as including "estate, "interest, equity and power." Section 44(1) provides that only the registered owner can operate by registered transaction. Section 44(2) permits equitable estates to be created and transferred without registration, and any right so created binds every registered transferee except one for value. Section 45 deals with rights which may be registered as burdens but section 44(3) seems to be concerned with other rights; rights which cannot be registered. The procedure for safeguarding them is by caution or inhibition. These sections do not refer in terms to equitable rights but, nevertheless, seem to take into account that such rights can exist. The authorities indicate that there may be unregistered equitable rights and estates in registered land in the same way as in unregistered land: *Tench v. Molyneux*[4]; *In re Murphy*[5]; *In re Murphy & M'Cormack*[6]; *Devoy v. Hanlon*[7]; *Quinn v.*

1 [1925] Ch. 12.
2 (1873) I.R. 6 Eq. 215.
3 (1879) 3 L.R. Ir. 135.
4 (1913) 48 I.L.T.R. 48.
5 [1928] I.R. 479.
6 [1930] I.R. 322.
7 [1929] I.R. 246.

M'Cool[1]; *Miscampbell v. M'Alister*[2]; *McParland v. Conlon*[3]; *In re Strong*[4].

The idea of the 1891 Act was to do away with the investigation of title, an idea which was not entirely novel. The Land Transfer Act, 1875, is in comparable terms. Under that Act it was held that the registered owner, whatever his actual interest, can transfer the entire estate. The estate of the transferee for value derives not from the transferor but from the Act: *Capital & Counties Bank Ltd. v. Rhodes*[5]; *Attorney-General v. Odell*[6]. Similarly a trustee or a limited owner under the 1891 Act may transfer the beneficial fee simple subject only to registered rights. A purchaser for value is absolutely protected against any right or equity which does not appear on the register and he is the person whom the Act was designed to protect. A person who is entitled to an unregistered equity can lodge an inhibition for his protection.

Mooney v. M'Mahon[7] is the mainstay of the appellant's argument. It is based on *Pim v. Coyle*[8], a case in which the court never addressed itself to the question of equities. The gravamen of the criticisms of that case is that the decision was too general in its terms. The decision may well be correct as it was probably dealing with the rights as between two volunteers, one of whom was registered and the other not, but the judgments are capable of being read as though they were laying down general propositions. The court in *Mooney v. M'Mahon*[7] wrongly applied the decision in *Pim v. Coyle*[8] to contracts for sale, and failed to recognise that different results follow according as the case is within section 25 or section 35. The decision in *Mooney v. M'Mahon*[7] is correct because the vendor in that case was bound by the provisions of section 25 which prohibit the creation of unregistered rights. It has no application to the present case in so far as sections 36 and 44 recognise that the purchaser may have an equitable estate. *Torish v. Orr & Smith*[9] depends upon its being a case within section 25. *M'Gettigan v. Roulstone*[10] may be justified as it was very probably an incomplete voluntary assignment.

The conflict in the authorities on the meaning of the words "in "Ireland" in section 16 of the 1844 Act raises the question of the binding effect on an appellate court of a series of decisions in a lower court. An appellate court is only bound if there has been long-

1 [1929] I.R. 620.
2 [1930] N.I. 74.
3 [1930] N.I. 138.
4 [1940] I.R. 382.
5 [1903] 1 Ch. 631.
6 [1906] 2 Ch. 47.
7 [1911] 1 I.R. 125.
8 [1907] 1 I.R. 330.
9 [1894] 2 I.R. 381.
10 [1910] 2 I.R. 17.

established uniformity, or an over-whelming preponderance for a certain view which has been accepted for a long period: *Bourne v. Keane*[1]. Under *Boyle v. Boyle*[2] a test is "where is the land?" and this view was accepted by Moore, Law of Charities in Ireland, but in *Re Brown*[3] the court thought it should be "where is the charity?". Then *In re Knox*[4] seems to suggest that the crucial question is "where "did the testator die?" Two quite conflicting views appear from *M'Dermott v. Anderson*[5]. It suggested that *Boyle's* case[2] applies the test of domicile and adopts the view that the Act was to protect testators in Ireland, thus providing the test "where was the will "made?"

In effect, four cases attempt to lay down five principles. It cannot, therefore be said that there is any stream of authority or consistency in the decisions. The mischief which the section struck at was the application of lands in Ireland to charity. Such lands could only be so applied if the charity operated in Ireland. The whole scope of the Act is confined to charities in Ireland. Compare the preamble and sections 2, 12 and 15.

Curran for the executor.

Lowry Q.C. in reply. The purpose of section 16 of the 1844 Act is to protect property in Ireland. On a first reading of the section it might be natural to assume that the words "in Ireland" qualify the words nearest to them, i.e. "pious and charitable uses," but such an interpretation would leave a very wide loophole. The Act was aimed at nullifying the effect of death-bed influence and the place where the testator makes his will is the place where that influence is felt.

At the time of his death the testator had no estate in the lands: *Torish v. Orr & Smith*[6]; *M'Gettigan v. Roulstone*[7]; *Mooney v. M'Mahon*[8]; *Pim v. Coyle*[9]. The first three of those cases have never been questioned, nor has it ever been suggested that *Pim v. Coyle*[9] was wrong on the question of no estate passing. *In re Murphy*[10], *In re Strong*[11] and *Tench v. Molyneux*[12] distinguish a purchaser's equitable right from an equitable estate. The equitable right which the purchaser gets is for all practical purposes as good as a legal estate, as between vendor and purchaser, but outside that relationship the difference is very important. It is a source of error to speak always of

1 [1919] A.C. 815.
2 (1877) I.R. 11 Eq. 433.
3 (1900) 35 I.L.T.R. 25.
4 [1910] 1 I.R. 20.
5 [1915] 1 I.R. 191.
6 [1894] 2 I.R. 381.
7 [1910] 2 I.R. 17.
8 [1911] 1 I.R. 125.
9 [1907] 1 I.R. 330.
10 [1928] I.R. 479.
11 [1940] I.R. 382.
12 (1913) 48 I.L.T.R. 48.

"the equitable estate" as though several persons interested in different ways could not have an equitable estate in the same land at the same time. In the case of a trust for sale, the will, speaking from death, gives the beneficiaries interested in the lands an equitable estate. As soon as a purchaser is found and a binding contract made with him by the executor, the purchaser also obtains an equitable estate where the land concerned is unregistered. Where the land is registered what the purchaser gets is an equity, as distinct from an equitable estate. In either case the beneficiaries continue to have an equitable estate in the lands until the sale is completed and the purchase money paid. The principle is the same where the agreement for sale precedes the death. In the present case the will, from the moment of death, gives the charities and other legatees an equitable estate in the land which subsists until the sale is completed and the purchase money paid. The doctrine of conversion would be the only way round section 16, and that is expressly ruled out by the authorities.

Cur. adv. vult.

LORD MACDERMOTT L.C.J. stated the facts and continued: The question under appeal turns on whether, in the events that have happened, section 16 of the Charitable Donations and Bequests Act, 1844, is applicable; but, on the arguments presented before this court, it also involves a point as to the consequences of registration under the Act of 1891 which has led to conflicting decisions and is of general importance. In these circumstances it will be convenient, in the first place, to examine section 16 and what it does, and then to consider the registration issue and its bearing on the question before us.

Section 16 of the Act of 1844 applies to gifts inter vivos as well as testamentary dispositions. With the omission of what relates to the former category or is otherwise immaterial, the section is in these terms:

> "....no donation, devise, or bequest for....charitable uses "in Ireland shall be valid to create or convey any estate in lands "....for such uses, unless the....will....containing the same "shall be duly executed three calendar months at the least before "the death of the person executing the same....."

At this stage we may ignore the words "in Ireland". The meaning of what remains is reasonably plain. If the section is to operate there must be (a) a gift of some estate in land and (b) that gift must be a gift for charitable uses. It is therefore clear that if this testator had sold his farm earlier, so that the purchase had been fully completed

before his death, section 16 would have had no application. The will would have conveyed no estate in the farm and no charitable use would have been attached to it. But as matters happened, did the will convey an estate in the farm and, if so, was that estate conveyed for the charitable uses of the testator's residuary gift? Let it be assumed for the moment—and this is an assumption entirely in the appellant's favour—that the will did operate to convey a beneficial interest or estate in the farm sufficient to be the subject matter of a gift. So assuming, the question then is whether that estate was conveyed for charitable uses. Now when we speak, or a statute speaks, of what a will or other instrument does, what is referred to is its operation according to law. In this case the executor, on the assumption I am making, took the testator's estate in the farm together with the testator's obligations in respect thereof which arose under the contract of sale; and in law there can be no doubt that the executor was bound to hold the farm, not for the residuary legatees, but for the purchaser, and to execute a transfer in his favour when he had paid the balance of the price. If one could stop there and look no further, the position would, I think, justify the view that, whatever estate in the farm passed under the will, there was nothing therein which operated to convey such estate for charitable uses, and, accordingly, no basis for the application of section 16.

This tentative conclusion must, however, be regarded in the light of two further considerations which I shall deal with before turning to what I have referred to as the registration issue.

The first of these considerations might be stated thus. An uncompleted sale of land, no matter how binding, does not necessarily mean that the land cannot form part of the vendor's estate after his death and cannot become subject to the dispositions of his will: the purchaser may default, or something may happen which will entitle him to repudiate. Such a possibility must be acknowledged, but in my opinion it does not trench upon the view already expressed. If an event happens which, as it were, returns the land to the estate by terminating the executor's duty to hold it for the purchaser, the consequence may well be that, as from that time, section 16 will apply so as to invalidate any gift of the land for charitable uses which would otherwise then become operative. But that all turns on the happening of the event. If it has not happened and, a fortiori, if there is no longer any possibility of it happening, there is nothing to impress the land with any charitable use declared by the will. Here, the sale of the testator's farm has been completed The event that might have

brought it back into the disposable estate as land has not arisen and can never arise now. The possibility is extinct and that, I think, means that it must be left out of account so far as section 16 is concerned.

The second consideration arises partly on authority. It has long been held, and may now be taken as settled law, that a gift of land to trustees upon trust to sell and apply the proceeds for charitable uses will be within section 16 and bad if made within three months of the testator's death: see *Sherlock v. Blake*[1]; *Donnellan v. O'Neill*[2]; *In re O'Connor*[3]; and *In re Byrne*[4], an interesting decision of the Supreme Court of the Irish Free State in which the earlier cases are considered. This rule—for such we may now call it—is sometimes explained by saying that as the donee of the proceeds of sale can elect to take the land in specie it would defeat the purpose of the section to hold otherwise. That, however, is not a satisfactory reason, for it ignores the fact that election to take in specie, or otherwise than in money, is in practice often impossible. The true ground for the rule seems to lie in this, that a gift in such terms is to be regarded in law as a gift of an estate in land for charitable uses. The reasoning for this has not always been expressed in the same way. Thus, Ronan L.J. in *In re O'Connor*[5], founding on *Brook v. Badley*[6] and *Cooper v. Cooper*[7] said "where there is a valid existing trust for the sale of lands, the equitable "fee is vested in all the persons entitled to the purchase-money;" while in *In re Byrne*[8] Kennedy C.J. put it in this way: "Reducing it to "its simplest terms we have an estate in lands created in, or conveyed "to, the trustees of the will for pious or charitable uses in Ireland, to "be applied thereto by way of selling the estate in the lands and "distributing the proceeds to the pious or charitable uses named. "I am of opinion that such a devise is clearly and explicitly within "the section...."

Much can be said for both these views and I see no need to choose between them. But if the rule which they support is well settled, its scope and consequences have certainly not been clarified by explanations relating to the equitable doctrine of conversion. That doctrine, it has been said, has no application to charities. This may be accepted as a description of the results of the rule, but confusion arises when it is taken further. The doctrine, no doubt, applies to contracts of sale as well as to trusts for sale and it is easy to say that if one form of conversion will not avail against section 16 neither will the other, or, to

1 (1865) 10 Ir. Jur. N.S. 350.
2 (1870) Ir. R. 5 Eq. 523.
3 [1922] 1 I.R. 139.
4 [1935] I.R. 782.
5 [1922] 1 I.R. 139, 146.
6 (1868) L.R. 3 Ch. App. 672, 674.
7 (1874) L.R. 7 H.L. 53, 64.
8 [1935] I.R. 782, 804.

put the matter in terms of the present case, if the testator's trust for sale could not defeat the section neither can his contract of sale. This, in my opinion, is quite fallacious. For one thing, the doctrine has really nothing to do with the operation of this enactment which depends on the language Parliament has used; for another the two forms of conversion have quite a different relationship to transactions within the ambit of section 16. The trust for sale attaches to land that is part of the testator's estate after his death, whereas the contract for sale takes the land that it embraces out of the estate and beyond the dispositions of the will.

On principle, then, it would seem that neither the possibility of the sale going off nor the doctrine of conversion should affect the tentative view I have expressed. I turn next to the registration issue and the bearing which it and the leading decisions upon it have on the question in hand.

The nature of this issue will best appear if I state the rival contentions shortly. The point made by Mr. Gibson, for the charities, was that the contract of sale gave the purchaser an equitable estate in the land with the result—(i) that the testator had no beneficial interest or estate, capable of being the subject of gift, in the land when he died, and (ii) that there was accordingly nothing to which section 16 could apply. Mr. Lowry for the appellant, on the other hand, while agreeing that a contract for the sale of unregistered land would vest an equitable estate in the purchaser, submitted that, in the case of registered land, this was not so, as the effect of the Act of 1891 was that the vendor lost and the purchaser took no estate in the purchased land until the transfer had been registered. Now if Mr. Gibson's submission is well founded the testator had no estate in the farm to leave for charitable uses and section 16 cannot apply. But if Mr. Lowry is right and the testator had an estate in the farm at the time of his death it does not follow that the section must apply. The point already discussed has still to be determined, namely, whether that estate can be regarded as the subject of a gift for charitable uses.

On this, as well as on the registration issue, Mr. Lowry's sheet anchor was the decision of the Court of Appeal in *Mooney v. M'Mahon*[1]. In that case Owen Mooney had purchased certain lands in fee simple under the Land Purchase Acts before the passing of the Act of 1891. In 1904 he divided the lands into four parcels and sold each of these, subject to the Land Commission approving of the division and the consequential apportionment of the annuity. The

[1] [1911] 1 I.R. 125.

purchasers were put into possession on a working arrangement pending the decision of the Land Commission, but Owen Mooney died before the approval of that body had been received, and before his own registration as owner had been completed. After Owen Mooney's death the Land Commission gave its approval, the sales were duly completed and each of the purchasers was registered as owner of his parcel. Owen Mooney died within three months of making his will. The lands in question were not dealt with specifically therein and if they passed thereunder it was as part of the residue which was devised and bequeathed for charitable purposes.

The Court of Appeal, affirming the Master of the Rolls, held that section 16 applied and that, in consequence, the residuary gift failed as respects the said lands and the proceeds of sale thereof.

This decision was not based on the circumstance that the contract was conditional, nor was the question canvassed as to how the lands could be held for charitable uses, if, in the events that happened, the testator's executors were bound to hold them for the purchasers. But those considerations apart, the decision goes far in Mr. Lowry's favour and the reasoning supports his contention that the testator in this case died possessed of his entire interest in the farm. For, although the reasoning was directed to the pre-registration provisions of section 25(1) of the Act of 1891 rather than to the post-registration provisions of section 35(2), its substance was that as a conveyance or transfer could not pass any estate in the lands before registration of the ownership of the grantee or transferee, a fortiori "a mere executory agreement for a sale" could not do so. In the judgment of the court, which was delivered by Cherry L.J.,[1] this was held to accord with "the entire spirit and intention of the Act, which is to make the "register the conclusive and only evidence of title in cases where "registration of title is compulsory."

Authority for this conclusion was found in *Pim v. Coyle*[2], and in a series of Parliamentary franchise cases of which mention may be made of *Torish v. Orr & Smith*[3] and *M'Gettigan v. Roulstone*[4].

In *Pim v. Coyle*[2] a registered owner of lands transferred her interest therein to her son by an instrument of transfer dated April 14, 1905. The son made delay in registering his title and did not do so until May 4, 1905. In the meantime, creditors of the transferor recovered judgment against her and registered the same as a judgment mortgage before the transferee had registered his title. The Court of Appeal

1 [1911] 1 I.R. at 135.
2 [1907] 1 I.R. 330.
3 [1894] 2 I.R. 381.
4 [1910] 2 I.R. 17.

(Sir Samuel Walker C., Fitzgibbon and Holmes L.JJ.), affirming the decision of Barton J., held that the transferor had not parted with her beneficial interest in the lands at the time when the judgment mortgage was registered and, accordingly, that the judgment mortgage took priority over the transferee's title.

The judgments in the Court of Appeal are short and contain no close scrutiny of the provisions of the Act of 1891. But it is reasonably clear that the view taken was that the execution of the transfer passed no interest at all in the land until the transfer was registered. As Fitzgibbon L.J., said[1] "the Act of 1891 expressly kept the estate in "the transferor until registration, and the earlier deed did not operate "upon the land at all—as against subsequently registered dealings— "until it was registered."

It has been said, and it may well be, that the transfer to the son in that case was voluntary. But this is not mentioned anywhere in the report and cannot, I think, be used to explain the decision. If the son was a volunteer the decision may be right. The reasoning of the court, however, is based on the general scheme of the Act of 1891, and if it is right it affirms the principle accepted in *Mooney v. M'Mahon*[2] and in the Parliamentary franchise cases. In those cases an equitable interest would have maintained the claim, but where the claimant's title was by deed the fact that his ownership had not been registered was held to mean that he had not acquired any estate in the lands conveyed to him.

The doctrine of these authorities comes to this, that in the case of registered land no interest in the land can pass inter vivos to anyone who is not registered as the owner thereof. The possibility of creating equitable interests outside the register is denied in accordance with what was taken to be the scheme and policy of the statute. With the greatest respect for the distinguished courts that have favoured this doctrine I must say that I find these authorities unsatisfactory. The judgments oversimplify the position under the Act of 1891 and disregard much that is of material importance in it. For example:

(i) No reference is made to section 44(2) which expressly provides that nothing in the Act shall prevent a person from creating any "right" in or over registered land, or to section 95(1) which says that unless there is something inconsistent in the context "right" includes estate, interest, equity and power.

[1] [1907] 1 I.R. at 337.

[2] [1911] 1 I.R. 125.

(ii) The proviso to section 36(1) is not noticed though it draws a clear distinction, as respects unregistered rights, between transfers made with and without valuable consideration.

(iii) Section 25(1) and section 35(2) strike in terms at the acquisition of an estate in land under an unregistered *conveyance or transfer*, and to conclude therefrom that a contract of sale for valuable consideration cannot give the purchaser an equitable interest in the land seems to be begging the whole question of what can exist off the register.

(iv) The fact that section 63 recognises that the beneficial interest may be off the register by providing that trusts are not to be noticed thereon is not taken into consideration or even mentioned.

But in *Tench v. Molyneux*[1] the Court of Appeal recognised the existence of equitable interests and in *Devoy v. Hanlon*[2], the Supreme Court of the Irish Free State disapproved what had been said in *Pim v. Coyle*[3], Kennedy C.J. saying[4]: "In so far then as *Pim v. Coyle*[3] "may be thought to be an authority for saying that a registered "owner cannot create any right, estate, interest, equity, or power in "or over registered land otherwise than by a registered disposition, "it is, in my opinion, in conflict with sect. 44, sub-sect. 2, and other "sections of the Act not cited to the Court, and cannot be regarded, "therefore, as a ruling decision on that question." And Murnaghan J. adding[5]: "The Act therefore provides for the recognition of rights, "including estates, which do not appear on the Register. Such rights "are valid against the registered owner creating them, against a "voluntary transferee from the registered owner, and against every-"one claiming through a voluntary transferee where the person so "claiming has not given valuable consideration."

Shortly afterwards, in this court, Andrews L.J. (as he then was) in *Miscampbell v. M'Allister*[6], referred to these views with approval. This, I think, was obiter, but in the same year the point was in issue in *McParland v. Conlon*[7], and the same court (Andrews and Best L.JJ.) held, after a full argument, in favour of the opinion expressed in *Devoy v. Hanlon*[2].

To my mind, the doctrine of *Mooney v. M'Mahon*[8] and of the authorities on which it was founded must yield to the provisions of

1 (1913) 48 I.L.T.R. 48.
2 [1929] I.R. 246.
3 [1907] 1 I.R. 330.
4 [1929] I.R. at 256.
5 Ibid. at 263.
6 [1930] N.I. 74.
7 [1930] N.I. 138.
8 [1911] 1 I.R. 125.

the statute, the criticisms in *Devoy v. Hanlon*[1] and the decision in *McParland v. Conlon*[2]. I am therefore against Mr. Lowry on what I have called the registration issue. I think the purchaser in this case had acquired an equitable interest in the farm at the time of the testator's death, and I also think that this interest was so extensive as to leave the testator no beneficial interest which could be accounted an "estate in lands" for the purposes of section 16. It does not seem to me to matter whether what the purchaser obtained as a result of the contract of sale was an "equity" or an "equitable estate." For my own part, I see nothing inapt about the latter expression. If A becomes registered owner of Blackacre which he has bought for his son B with his son's money, A is a trustee for B and I should have thought it consistent with the provisions of the Act that B should be regarded as having an equitable estate in Blackacre. In Glover on Registration of Ownership of Land in Ireland, chapter IV, however, the learned author is emphatic that the correct term is "equity" and not "equitable estate." I am not clear why this should be so in every case, but for present purposes the point is not of importance and I do not, therefore, propose to carry it further.

I am also against Mr. Lowry on the question on which I have already expressed a tentative opinion. I remain of the view that *if* the testator died possessed of a beneficial estate in the farm it was held on trust for the purchaser and not for charitable uses. There is nothing in the authorities or in the Act that I can see to lead to a contrary conclusion.

On these grounds I am of opinion that McVeigh J. was right in holding that section 16 did not apply and I would, accordingly, dismiss the appeal. I should add that, as an alternative to his main argument, Mr. Gibson also contended that if section 16 did apply it was only in relation to charities in Ireland and so could not affect two of the residuary legatees whose charitable activities were outside Ireland. We heard a full and careful argument on this aspect of the case in the course of which Mr. Gibson challenged what has been the prevailing view in courts of first instance for many years. It is, however, unnecessary to deal with this interesting and difficult point. It does not arise on the conclusion I have reached and no good purpose would be served by now commenting upon it.

CURRAN L.J.: I agree and have nothing to add.

SHEIL J.: I also agree.

Appeal dismissed.

[1] [1929] I.R. 246.

[2] [1930] N.I. 138.

Solicitors for the next-of-kin: *C. & H. Jefferson.*
Solicitors for the residuary legatees: *Cleaver, Fulton & Rankin.*
Solicitors for the executor: *Hugh Hayes & Son.*

S.M.M.

CITY BRICK AND TERRA COTTA CO. LTD. v. BELFAST CORPORATION[1].

Local Government—Street vested in local authority—Nature of authority's interest in site of street—Duration of interest—Stopping up order—Power to impose term requiring payment of money as condition of making order—Belfast Improvement Act, 1845 (8 & 9 *Vict. c. cxlii*), *s.* 12—*Belfast Improvement Act*, 1878 (41 & 42 *Vict. c. clxxx*), *s.* 52.

The plaintiff company, the owner of all the lands abutting on a public street in Belfast which had become disused after the air raids in 1941, applied to the Belfast Corporation pursuant to section 52 of the Belfast Improvement Act, 1878, for an order stopping up the street. The Corporation, being satisfied that it would not be prejudicial to the public interest to do so, agreed to make the order sought on certain terms. One of these terms was that the plaintiff company should pay to the Corporation a sum representing one-third of the value of the ground involved. The company objected to this term, contending that, as owner of the land, it was entitled to have the land returned without any such payment on the determination of public rights over the street.

It was accepted by both parties that the street in question was vested in the Corporation by reason of section 12 of the Belfast Improvement Act, 1845.

Held, by McVeigh J., (i) that there was vested in the Corporation the property in the surface of the street and in an undefined depth below the surface extending so far as was necessary for the purpose of maintaining and preserving the street as a public highway: (ii) that the interest of the Corporation was determinable and endured only so long as the street remained a public street, so that the Corporation had no disposable interest in the street.

Held, by the Court of Appeal, reversing McVeigh J. on this point, that the Corporation had no power to include in the order stopping up the street a term providing for the payment of a sum of money in respect of the relinquishment by the Corporation of either public rights over the street or the Corporation's interest in the street.

Per curiam. Where a local authority is given a statutory power exerciseable in its discretion it cannot lawfully impose a charge as a condition of exercising that power unless clearly authorised so to do by statute.

Attorney-General v. Wilts. United Dairies (1921) 37 T.L.R. 884 applied.

ORIGINATING SUMMONS.

The City Brick and Terra Cotta Company Ltd. (hereinafter called "the company"), having acquired the whole of the lands abutting on a cul-de-sac known as Orr's Entry and situate off High Street in the City of Belfast, applied to the Belfast Corporation pursuant to section

[1] In the Chancery Division before McVeigh J.: May 1, 2, July 31, 1957.
In the Court of Appeal before Lord MacDermott L.C.J., Black and Curran L.JJ.: Feb. 3, 4, March 3, 1958.

52 of the Belfast Improvement Act, 1878[1], for an order wholly stopping up the Entry.

The Entry was shown in an official list of Belfast Streets in 1874 as being maintainable by the public, but no evidence was available to show when it had become vested in the Corporation. It was accepted, however, for the purpose of these proceedings that the Entry was a street to which section 12 of the Belfast Improvement Act, 1845, applied[2]. Up to 1941 the Entry gave access to certain business premises on the North side of High Street, but in that year the buildings served by the Entry were destroyed in an air raid and had not been rebuilt or replaced at the time when the company applied to the Corporation for a stopping up order.

The Corporation, having considered the company's application, resolved that it would be prepared to make the order applied for on certain terms, on the basis that, in the opinion of the Corporation,

[1] Belfast Improvement Act, 1878, s. 52: "The Corporation may, on the application in writing of the owners of "at least three fourths in the length "of the land or buildings abutting on "any street, highway, footpath, or "court, from time to time, by order, "vary, divert, or stop up wholly or "partially any such street, highway, "footpath, or court, (if in the opinion "of the Corporation such variation, "diversion, or stopping up shall not "be prejudicial to the public interests), on such terms as to the vesting "of the soil and other matters as may "be agreed on between the Corporation and the owners and lessees "of buildings and lands abutting on "the street, highway, footpath, or "court; and on any street, highway, "footpath, or court being so varied, "diverted, or stopped up, all public "and other rights of way and other "rights in, over, or on so much thereof as shall be stopped up, and "whether or not any variation or "diversion shall be made, shall be "absolutely extinguished, but no "such order shall be executed until "after the expiration of one month "from the time when it has been publicly posted at each end of the street, "highway, or footpath, or at or in "the court to which it relates."

[2] Belfast Improvement Act, 1845, s. 12: "And be it enacted, That the present "and all future public Streets, Roads, "Highways, Lanes, Passages, and "other public Places within the Limits "of this Act, and all the present and "future Drains and Sewers under or "over such Streets, Roads, Highways, "Lanes, Passages, and Places, and all "the present and future Pavements, "Stones, Gravel, and all other "materials of such Street, Roads, "Highways, Lanes, Passages, and "other public Places, Drains, and "Sewers, and all Tenements, and all "Utensils, Lamps, Lamp Irons, "Lamp Posts, Implements, Goods, "Chattels, Effects, Materials, Matters, "and Things, provided by or vested "in the Commissioners and Committee, or either of them, or the "Council of the said Borough, under "the said Two first-recited Acts "hereby repealed, for the Purposes "of the said Acts, or which shall be "made or provided under the Provisions of this Act, and all other "Implements and Apparatus, "Materials, Articles, and Things "whatsoever, purchased or provided "under Authority of the said Two "first-recited Acts or of this Act for "any of the Purposes thereof, shall "be the Property of and they are "hereby vested in the Mayor, Aldermen, and Burgesses of the said "Borough."

the stopping up of the Entry would not be prejudicial to the public interest. The terms proposed by the Corporation were as follows:

(1) That the sum of £1,666. 13. 4. be paid by the company.

(2) That the sum of £5. 10. 0. be paid by the company for the materials of the Entry so stopped up (except two gulleys which were to remain the property of and be removed by the Corporation).

(3) That the sum of £20 be paid by the company for the alteration and removal of the services in the Entry.

The sum of £1,666. 13. 4. was fixed pursuant to a resolution adopted by the Corporation in 1883, whereby it was resolved that on applications made under section 52 of the Act of 1878 one of the terms to be included would thenceforth be one providing for the payment by the applicants of a sum equal to one-third of the value of the ground involved in the application.

The company objected to the imposition of a term requiring the payment of a sum of money in respect of the value of the site of the street, contending that the ground belonged to the company subject only to the public rights over it, and these proceedings were brought by way of originating summons to determine whether the Corporation had power to impose a term requiring such payment.

The questions ultimately left for the determination of the court were:

1. Whether, on the true construction of section 12 of the Belfast Improvement Act, 1845, and assuming the said section applies to the Entry referred to in the application (hereinafter referred to as "Orr's Entry") the Corporation have

   (a) a fee simple estate
      (i) in the land comprising Orr's Entry; or
      (ii) in the surface of Orr's Entry; or

   (b) some other, and if so, what estate or interest
      (i) in the land comprising Orr's Entry; or
      (ii) in the surface of Orr's Entry.

2. If the answer to question 1 (a) (i), 1 (a) (ii), 1 (b) (i) or 1 (b) (ii) is "yes," whether such estate or interest is disposable?

3. Whether on the true construction of section 52 of the Act of 1878, and on the assumption referred to in Question 1, the making of an order under the said section 52 stopping up Orr's

Entry would automatically determine the Corporation's estate or interest

(a) in the land comprising Orr's Entry; or

(b) in the surface of Orr's Entry.

4. Whether, on the true construction of section 52 of the Act of 1878, and on the assumption referred to in Question 1, the following words contained in the said section, namely:

"on such terms as to the vesting of the soil and other matters "as may be agreed on between the Corporation and the "owners and lessees of buildings and lands abutting on the "street, highway, footpath, or court;"

include, in relation to an order under the said section stopping up Orr's Entry, a term providing for the payment to the Corporation by the plaintiffs of

(a) a sum of money representing the value of the disposable interest (if any) of the Corporation—

(i) in the land comprising Orr's Entry; or

(ii) in the surface of Orr's Entry; or

(b) a sum of money in respect of the Corporation's relinquishment of—

(i) any estate or interest in the land comprising Orr's Entry extinguished by such order; or

(ii) any estate or interest in the surface of Orr's Entry so extinguished; or

(iii) the public right of way so extinguished.

Nicholson Q.C. and *Murray* for the plaintiff company. We accept for the purposes of the present proceedings that the public rights over the Entry still subsist, although it may be in the circumstances that the highway has been destroyed and is no longer in existence.

At common law, on the extinguishment of a highway the former rights of the owner subsist, discharged from the public rights: see Pratt & Mackenzie on Highways, 17th ed., p. 160. In Ireland the position seems to be the same, as this view was apparently accepted by the framers of the Roads Act (Northern Ireland,) 1948. Dedication of a highway only gives to the public a right of passage, and there is no reason why the owner of land which has been subject to such a right should be required to pay to have his own property restored to

him, especially since the public has benefitted by the cesser of its obligation to maintain the highway, which must in any case have become useless to the public before it is extinguished.

The statutory provisions applicable to the present case must now be considered. We say that they are to be approached on the basis that Parliament ought not to be taken to have imposed on the owners of land subject to public rights any additional burden to that imposed at common law, unless it has done so expressly. The statute which applies to this street would appear to be the Act of 1845, section 12, although it is not clear precisely how the street became vested in the Corporation. We submit that the words of section 12 do not operate to vest the subsoil of Orr's Entry in the Corporation, but only the surface, together with such ancillary rights below the surface as are required for the purpose of maintaining the street as a highway. The rights of the Corporation subsist only so long as the purpose for which they were given subsists: see *Rolls v. St. George the Martyr, Southwark, Vestry*[1]. That case dealt with the terms of the Metropolis Local Management Act, 1855, and while section 96 of that Act refers to "streets, being highways," we say that the same principles are applicable to section 12 of the Belfast Act of 1845, notwithstanding that the wording is different. *Rolls*' case[1] was considered recently in *Tithe Redemption Commission v. Runcorn U.D.C.*[2], a case which related to section 29(2) of the Local Government Act, 1929, and, while it may be that that case went somewhat further in relation to the nature of the estate given to the highway authority than *Rolls*' case[1], we submit that it lends support to our submission that the estate of the Corporation subsists only so long as the street remains a highway.

If the Corporation's estate is only a determinable interest which comes to an end when the street ceases to be a highway, then the Corporation has no disposable interest when a stopping up order is made, and it has nothing to sell: see *Municipal Council of Sydney v. Young*[3].

Section 52 of the Act of 1878 empowers the Corporation to fix such terms as to the vesting of the soil and other matters as may be agreed, but if that power relates to financial terms we submit that the furthest the Corporation could go would be to provide for compensation of the owners of the soil inter se. The Corporation could not be entitled to compensation, for they have nothing to give. It would be contrary to the established principles of construction to hold that the Cor-

[1] (1880) 14 Ch. D. 785.
[2] [1954] Ch. 383.
[3] [1898] A.C. 457.

poration is empowered to interfere with the rights of the plaintiff without express authorisation: see Maxwell on the Interpretation of Statutes, 9th ed., pp. 289-90; *Central Control Board v. Cannon Brewery Co.*[1]; *Wells v. London, Tilbury & Southend Ry. Co.*[2]; *Walsh v. Oates*[3]. Accordingly section 52, when it speaks of terms as to vesting of the soil, should be construed either as relating to vesting of the soil as between adjoining owners, or else to the vesting of the "skin" or surface which is vested in the Corporation. The Corporation is endeavouring to impose a charge for the exercise of its statutory powers, which it cannot do in the absence of specific statutory authority: see *Reg. v. Bowman*[4].

The Corporation is in effect trying to sell the Entry to the owners; although this is not expressly stated, it appears from the terms of the application form provided by the Corporation, and from the terms of the resolution of 1883. It is clear, however, from the terms of the Act of 1878 that the Corporation cannot make such a sale, because section 50 contains an express power of sale of materials which would not be necessary if such materials were already vested under the Act of 1845 as is contended for by the Corporation.

Gibson Q.C. and *Moody* for the Corporation. We submit that section 12 of the Act of 1845 vests the subsoil of the Entry in the Corporation absolutely. It refers to the vesting of chattels, as well as streets, and the chattels must be vested absolutely. It has been suggested that such a vesting would be alien to the general principles of the law, but we say that is not so. Section 10 of the Roads Act (Northern Ireland), 1948, vests trunk roads in the Ministry, and that is an absolute vesting.

[MCVEIGH J. That may involve a question of construction also.]

Highways created by statute are quite different from those dedicated under the common law. It is true that at common law a highway, when extinguished, reverts to the owner of the soil, but when the highway is a statutory creation the nature of the estate of the authority is dependent solely on the terms of the statute.

The estate of the Corporation in the Entry is not merely a terminable one. If it were the case that the making of an order under section 52 of the Act of 1878 determined the estate of the Corporation automatically, then the property would revest under the statute, and there would be no need for the Corporation's power to make terms

[1] [1919] A.C. 744.
[2] (1877) 5 Ch. D. 126.
[3] [1953] 1 All. ER. 963.
[4] [1898] 1 Q.B. 663.

in the order as to the vesting of the soil. In this respect there is a contrast between the terms of the Act of 1878 and the Highway Act, 1835, sections 84 and 85.

Rolls' case[1] is distinguishable at law and on its facts. In that case the position was that an order stopping up the street had already been made, whereas in this case the street still remains a public highway. Again much stress was laid by the court, particularly by Thesiger L.J., on the background of the Metropolis Management Act, 1855, from which the court presumed that the rights intended to be conferred on the authority were coextensive only with the streets in respect of which they were given. The background of that Act was quite different from that of the 1878 Act, because while it appeared in *Rolls'* case[1] that the streets had not been vested in the authority prior to 1855, the street in the present case was vested in the Corporation by virtue of the Act of 1845.

In this case the Corporation has still an estate in the land, and the matter has to be approached on the basis that in deciding whether to make a stopping up order the Corporation has to take into account whether it would be prejudicial to the interest of the public to release the estate for nothing. The use of the highway is a question of degree, and the return to be received by the Corporation may make a difference.

Section 52 empowers the Corporation to make provision for "vesting" and "other matters," and we say that those terms are wide enough to empower the Corporation to require a money payment. Such a payment can be regarded as a matter ancillary to vesting, or as an "other matter." The ejusdem generis rule would not be applicable, for it is unusual to apply that rule in a case where only one subject is mentioned. The scope of the section supports our view, for it deals with the diversion of highways as well as stopping up, and in the case of diversion of a street from A's land to B's land there would have to be some compensation to B which would involve a money payment. If it is reasonable to provide a money payment for individual owners it would not be unreasonable to provide compensation for the Corporation in respect of the public rights released. This argument remains applicable whether the Corporation has only a terminable interest or an absolute interest.

[McVeigh J.: Your argument seems to beg the question to some extent.]

[1] (1880) 14 Ch. D. 785.

We say only that the section contemplates provisions involving the payment of money, and that in dealing with a composite matter of this kind it is not unreasonable to include such provisions, either in the context of the owner or of the Corporation.

Cur. adv. vult.

McVEIGH J. stated the facts of the case and continued: This case was argued by both parties on the basis that Orr's Entry was a street to which section 12 of the Belfast Improvement Act, 1845, applied. No evidence was before me to indicate that the Entry was in existence at the time of the passing of the 1845 Act or whether it was made or provided later under the provisions of that Act. The Entry does not appear to be one of the new streets mentioned in section 58 of that Act, but it may well have been constructed under the provisions of section 63 or 82 of the said Act; if so no certificate is available under section 86. I am, however, left without any material upon which to decide this matter, but am asked to answer the questions formulated on the assumption that the Entry is a street to which section 12 of the 1845 Act applies.

The importance of section 12 in this case is that streets within the said section are declared to be "the property of and they are hereby "vested in the Mayor, Aldermen, and Burgesses of the said Borough."

It was argued for the plaintiffs that the effect of section 12 is not "to vest" the land but at most "only the surface or such right below "the surface as was essential to the maintenance and occupation and "exclusive possession of the street and the making and maintaining "of the street for the use of the public." The word "vest" has an established meaning, it generally means to "give the property in": see Brett L.J. in *Coverdale v. Charlton*[1]. That was a case in which the meaning of section 149 of the Public Health Act, 1875, was called in question; the said section provided that "all streets being, or which "at any time become, highways repairable by the inhabitants at large "within any urban district, and the pavements, stones, and other "materials thereof, and all building implements and other things "provided for the purposes thereof, shall vest in and be under the "control of the urban authority." The Court of Appeal in that case held that the word "vest" did not vest all above and below the surface of the street. Bramwell L.J. says[2]: "That would shew that 'street' "comprehends what we may call the surface, that is to say not a "surface bit of no reasonable thickness, but a surface of such thickness

[1] (1878) 4 Q.B.D. 104, 120-1. [2] Ibid. at 118.

"as the local board may require for the purpose of doing to the street "that which is necessary for it as a street, and also of doing those "things which commonly are done in or under the streets; and to "that extent they have a property in it."

Brett L.J., while he holds that vest means "give the property in," goes on to say that one must next consider what is the subject matter to which the word "vest" relates. It does not say that "the land" shall vest, but only that "the street" shall vest. And he states that[1] "street" includes "the surface and so much of the depth as may be not un- "fairly used, as streets are used."

Cotton L.J.[2] considered that the section meant that the street and the surface vested in the local board some property in the soil for the purpose for which it was to be used, and he held that "the street" was a material thing and that it vested in the sense delineated by him. One must bear in mind that the words in the section being construed related to streets "being highways or which at any time become high- "ways." The latter words in inverted commas do not appear in section 12 of the 1845 Act nor do the words "be under the control of," and it is also to be noted that before the words of vesting in the 1845 Act the following phrase appears, viz. "shall be the property of...."

In the present case what vests is a public street and, in my view, it vests to the extent indicated in *Coverdale v. Charlton*[3]. I do not consider that the differences referred to above in the two sections should bring me to a different conclusion to that arrived at in *Coverdale v. Charlton*[3] as to what vests.

It now becomes necessary to consider the case of *Rolls v. St. George the Martyr, Southwark, Vestry*[4], a decision of the Court of Appeal. In that case the relevant point related to a street which had been stopped up by order of quarter sessions and the question arose as to whether the plaintiff, on whose land the stopped up street was, had any right to convert to his own use the stopped-up part. Section 96 of the Metropolis Local Management Act, 1855, provided that the "streets being highways, and the pavements, stones, and other "materials thereof.... shall vest in and be under the management and "control of the vestry or district board of the parish or district in "which such highways are situate."

The court followed and approved of the decision in *Coverdale v. Charlton*[3] and came to the conclusion that what vested under Section

[1] (1878) 4 Q.B.D. at 121.
[2] Ibid. 126.
[3] (1878) 4 Q.B.D. 104.
[4] (1880) 14 Ch. D. 785.

96 was, in the words of James L.J.[1], "only the surface, and with the "surface such right below the surface as was essential to the main- "tenance, and occupation, and exclusive possession of the street, and "the making and maintaining the street for the use of the public."

Cotton L.J., explaining the decision in *Coverdale v. Charlton*[2] to which he was a party, says[3]: "they decided that at least the surface of "the soil was vested in the local board under the Act," and later "what was so transferred and vested in them was a material thing, "and not a mere incorporeal right to protect the passage of the public "over the highway." Thesiger L.J. agrees with this view as to what vests.

Having now indicated what is the nature of the property which vests it becomes necessary to consider the duration of the local authority's interest in that property. It has been pointed out by Thesiger L.J. in the case cited that it is important to see what was the position of the law as regards highways at the time the Act he was considering was passed, and, no doubt, it would be wise to act similarly in the present case.

The Lord Justice points out that prior to the Metropolis Management Act, 1855, the statute under consideration, the law was substantially contained in the Highway Act, 1835, and that the management of highways under that Act was practically placed in the hands of the parish surveyor or the district surveyor as the case might be. "That functionary," he says[4], "had no rights in roads beyond mere "rights of control and management which he exercised under orders "of the vestry, or the district board as the case might be, and both the "property in the road and the possessory rights in respect of the road, "subject of course to the right of passage on behalf of all the Queen's "subjects, were vested entirely in the persons, or the successors of the "persons, who had originally granted the right of passage to the "public.

"That being the position of roads under the Highway Acts, certain "powers were given by those Acts, not only to parishes themselves "but also to owners of property, to obtain either the absolute stopping "up of roads without any compensation being given in the shape of "substitution of other roads, or the turning or diverting of roads, "which, of course, involved the giving to the public something in "compensation for the diverted or turned road; and in that state of

1 (1880) 14 Ch.D. at 796.
2 (1878) 4 Q.B.D. 104.
3 (1880) 14 Ch.D. at 798.
4 Ibid. 801.

"things we come to the consideration of the Act of 1855, bearing in "mind this, that under that Act the district boards or vestries of the "parishes mentioned in schedule A were substituted for the district "or parish surveyor of highways, and the management and control of "the highways within their respective districts were vested in them. "But it appears to have been considered by the Legislature that in "order to enable them to execute their functions properly it was "necessary to give to them some further powers and greater rights "than those which had been originally possessed under the *General* "*Highway Act* by the surveyor of highways, and that is carried out by "giving to them over and above. . . . the rights of control and manage- "ment to which they would succeed as invested with the functions of "the old surveyor of highways some right or property in the soil, or a "portion of the soil of the street." He goes on to point out that a consideration of the terms of the Act of 1855 indicate that the powers given are only for the purpose of the Act, that is, that the additional powers would only be co-extensive with the existence of the streets in respect of which the rights and powers given by the Act were to be exercised. The language of the Act he regards as being not quite so clear in its language as might be desired.

When he comes to consider the actual words of the section in order to see if there is anything in the words of the section to prevent him giving effect to that view he says[1]: "The things in which some property "is to be vested in the board are not described simply as 'streets,' but "as 'streets being highways.' What is the meaning of that expression? "Obviously it is not to be limited to streets being highways existing at "the time of the passing of the Act. We, therefore, must go beyond "the strict grammatical construction of the words, and the meaning "appears to me to be this, that there are to be vested in these local "authorities for the purposes to which I have referred the streets "being highways which may from time to time exist within their "districts. Consequently we have to look, not to the time of the pass- "ing of the Act, nor to the time at which any particular street or "highway may have come into existence, but we are to look at the "time when any question of the government or control of streets "comes into question, and we are to see what are the streets 'being "highways' which are at that time managed by the board, and in "respect of which, therefore, there is a property vested in them." He then proceeds to point out that at the time the dispute in that case arose the streets had been put an end to by order and he says[2]: "There-

[1] (1880) 14 Ch.D. at 803. [2] Ibid. 804.

"fore the thing being gone, and the objects for which the powers and "rights were granted to the vestry being also gone, it seems to me to "follow that those powers and rights are also gone."

The words "being highways" do not appear in section 12 of the 1845 Act, and these words are referred to by Thesiger L.J., Cotton L.J. and James L.J. as throwing light on the duration of the estate under the section there being construed. The absence of these words in section 12 does not, I think, require me to come to a different conclusion to that arrived at by those judges in *Rolls'* case[1]. They decided that the streets were to remain vested in the vestry only so long as they were used for the purpose of streets, that is so long as they continue to be public streets. I am inclined to the view that section 12 of the 1845 Act vests all the things there mentioned (including streets) only so long as they exist for the purposes of that Act, that is, so far as "streets" are concerned, only so long as they continue to be "public "streets." It would not have been appropriate in section 12 as drafted to have used the words "being highways" because "public highways" are themselves mentioned as one of the group of things which vest. I think that the section only vested "the present and all future public "streets...." for an estate which lasts so long only as the streets remain public streets. This construction seems to serve adequately the purposes of the Act, but the language of the section is not particularly easy to construe.

If one looks at the background of section 12, that is the state of the law when it was passed, one finds that so far as the Grand Jury Acts were concerned the position in Ireland was that, on the stopping up of a road, the site revested in the owner free of all public rights. In the case of *Herbert v. Kennan*, Pennefather B. says[2]: "The county "surveyor has a right to keep such a passage in repair, and the public "are entitled to use it as such, but no further. The right to the soil, "and the freehold and title, continues in the landlord, and if it should "happen that at any time the passage should be closed up, the right "to the possession of the surface will then be re-vested in him." This decision was approved of in *Merrick v. Cummins*[3]. This statement of the law is accepted in Vanston's Local Government, vol. 1, pp. 113 and 343. Thus it seems that the position in Ireland under the Grand Jury Act as to revesting was similar to that which existed in England under the Highway Act, 1835. If that was the legal position in Belfast

[1] (1880) 14 Ch.D. 785.
[2] (1854) 7 Ir. Jur. R. 43, 45.
[3] (1858) 9 I.C.L.R. 249.

it would seem to be reasonable to say that the vesting of streets which takes place under section 12 of the 1845 Act does not endure in extent of interest or time beyond that indicated in *Coverdale v. Charlton*[1] and *Rolls'* case[2]. However, so far as Belfast is concerned, there were two Improvement Acts which preceded the Act of 1845 and these are recited in the preamble to that Act. They were not opened to me, but I have looked at them because of the observations of Thesiger L.J. in *Rolls'* case[2] as to examining the state of the law prior to the Act under consideration. The first is the Act of 1800, a statute of the Irish Parliament (40 Geo. 3 c.i.), and the second is the Act of 1816 (56 Geo. 3. c. lvii). The relevant portion of the earlier Act would appear to be section 15 which has the marginal note "Property to be vested in "Commissioners" and begins with these words: "And be it further "enacted.... that from and after the passing of this Act the right and "property of, in and to all and every the pavements in the several "streets, lanes, and other places within the said town of Belfast and "the precincts thereof, and also of, in and to the lamps, irons, timber, "and all other materials and things which shall be made use of for the "purposes of this Act, and of, in and to all and every the stones, posts, "and old materials of every denomination belonging to the old or "present, or any future pavement, as well of the carriageways as of "the footways within the said town or precincts of Belfast shall be "and the same is and are hereby vested in the commissioners for the "time being, for carrying this Act into execution...." This section appears to vest (in addition to stones, posts and old materials) only the "pavements" of footways and carriageways within the town of Belfast. "Pavement," although there is no definition of it in the Act, would connote some kind of making up material, not necessarily flagging (see the use of both words in sections 10, 11 and 14) but a formed and made up surface of some kind, however insubstantial: see for example *Hampstead Vestry v. Hoopel*[3].

It is this material of the surface or "skin" of the street which, in my opinion, vests under section 15 of the Act of 1800, and not an interest in the deeper soil of the street.

It is now necessary to consider if the Act of 1816 (56 Geo. 3, c. lvii) has added anything which would clarify the meaning of section 15 of the earlier Act. There does not appear anything in the Act of 1816 bearing on the matter. Section 21 enables the Commissioners of Belfast to widen and extend streets, lanes, passages etc., and for the

[1] (1878) 4 Q.B.D. 104.
[2] (1880) 14 Ch. D. 785.
[3] (1884) 15 Q.B.D. 652, 658.

purpose of doing so they may purchase houses, walls, buildings, land, tenements or hereditaments which obstruct or prevent the carrying out of the widening and extending of such streets, and may pull down or use the same. There is no evidence which shows that the Corporation purchased any houses, land or any of the other things mentioned for the purpose of extending or widening Orr's Entry.

In the light of this antecedent legislation one examines section 12 of the 1845 Act, and it is to be noticed that what the section vested, and I refer only to the relevant matters, were:

(a) the present public streets, roads, highways, lanes, passages, and other public places....provided by or *vested* in the Commissioners and Committee, or either of them, or the Council of the said Borough, under the two first-recited Acts hereby repealed (i.e. the Acts of 1800 and 1816), for the purposes of the said Acts;

(b) future public streets, etc., provided under the provisions of this Act (i.e. the Act of 1845).

Under the Act of 1800, the things which vested were:

(a) the pavements in the several streets, lanes and other places;

(b) lamps, irons, timber, and all other materials which shall be made use of for the purposes of the Act; and

(c) all and every the stones, posts, and old materials belonging to the old, or present or any future pavement.

Now under the Act of 1845 one finds that the things which vest are:

(a) all present and future public streets, roads, highways, lanes, passages, and other public places....;

(b) all present and future drains and sewers over or under such streets, etc.;

(c) all present and future pavements, stones, gravel, and all other materials of such streets, etc.;

(d) all tenements;

(e) all utensils, lamps, lamp irons, lamp-posts, implements, goods, chattels, effects, materials, matters, and things;

(f) all other implements and apparatus, materials, articles, and things whatsoever purchased or provided under the recited acts or the Act of 1845.

This is a much extended list, and it is now seen that not only the pavement of a public street is vested, but also the street itself, or the

road, highway, lane or passage as the case may be. Does this extended section indicate that some interest in the soil, that is, other than the material of the surface, is vested? Light is thrown on this by considering what is the effect of vesting sewers and drains. In section 13 of the Public Health Act, 1875, it was provided that all existing and future sewers shall vest in and be under the control of the local authority and this provision was held in *Bradford v. Mayor of Eastbourne*[1] to give "such ownership and such rights only as are necessary "for the purpose of carrying out the duties of a local authority with "regard to the subject matter." I have already referred to the case of *Coverdale v. Charlton*[2] which indicates the extent of interest conveyed by vesting of "streets"; I would refer also to *Mayor of Tunbridge Wells v. Baird*[3] which discusses the extent of property conveyed when "streets" are vested and Lord Halsbury describes it as follows[4]: "It "was thought convienient, I presume, that there should be something "more than a mere easement conferred upon the local authority, so "that the complete vindication of the rights of the public should be "preserved by the local authority; and, therefore, there was given to "them an actual property in the streets and in the material thereof. . . . "It is intelligible enough that Parliament should have vested the "street quâ street, and, indeed, so much of the actual soil of the street "as might be necessary for the purpose of preserving and maintaining "and using it as a street.

"But the provisions with respect to the subsoil are totally different. "In the first place, it lies plainly before one that if the complete vest- "ing of the whole of the property in the land over which the public "had rights or duties of repair were intended to be given, there would "be no reason in the world why the Legislature should not have said "so, whereas it has carefully guarded apparently, in the various Acts "of Parliament to which reference has been made, against any sug- "gestion that it ever was intended to convey the land over which the "public right existed in the sense in which it would be conveyed to an "ordinary private proprietor if you were conveying a piece of land."

It seems to me that the background to the Act of 1845 does not require one to give to that Act any different meaning as to the extent of what is vested thereunder than is contained in the cited decisions.

Is the duration of the vesting under section 12 a perpetuity, or is it determined when the street ceases to be a public street? My view is that the duration of the vesting is the same as that indicated in *Rolls*

[1] [1896] 2 Q.B. 205, 211.
[2] (1878) 4. Q.B.D. 104.
[3] [1896] A.C. 434.
[4] Ibid. 437.

v. St. George the Martyr, Southwark, Vestry[1]. This is confirmed by the cases of *Mayor of Bradford v. Eastbourne*[2] and *Mayor of Tunbridge Wells v. Baird*[3] where the judgments and speeches suggest that such vesting endures only so long as the street is a street, and that it vested only for such period as was necessary for enabling the local authority to perform their statutory duties and to exercise their statutory rights and powers, and I do not consider that there is anything in the antecedent legislation which compels me to a different conclusion.

Accordingly, the result of this judgment so far is that:

(i) the defendants have vested in them so much of the soil of Orr's Entry as is necessary for the purpose of preserving and maintaining and using it as a street, or, as is perhaps more accurately stated by Cozens-Hardy M.R. in *Foley's Charity Trustees v. Dudley Corporation*[4], they have a property in and possession of the surface of the road, and of and in an undefined depth below the surface, and have also a property in an undefined section of the air above, so far in each case as is necessary for the discharge of their duties;

(ii) this interest is determinable and endures only so long as the said Entry remains a public street, lane or passage.

The precise description of the interest so outlined has been the subject of recent decision. In *Tithe Redemption Commission v. Runcorn U.D.C.*[5] the Court of Appeal reviewed and applied the cases of *Rolls v. St. George the Martyr, Southwark, Vestry*[1], *Mayor of Wells v. Baird*[3] and *Foley's Charity Trustees v. Dudley Corporation*[4], and decided that the interest which a local authority took in a street vested in this way was a determinable statutory fee simple ceasing when the street properly and legally ceased to be a street.

Now it becomes necessary to consider the effect of section 52 of the Belfast Improvement Act, 1878. The plaintiffs say that it would be unreasonable and invalid for the defendants to require payment of a sum of money because, even although the defendants may have the interest which I have already defined, they could not dispose of it; the interest only exists, they say, and I think this is correct, for the purpose of maintaining the Entry as a public street or passage and thus, even during its existence, it is not something which can be turned into money or to another use. Furthermore, the plaintiffs say, and I

1 (1880) 14 Ch. D. 785.
2 [1896] 2 Q.B. 205.
3 [1896] A.C. 434.
4 [1910] 1 K.B. 317, 322.
5 [1954] Ch. 383.

think this is also correct, that when the closing order has been made under section 52 such interest as the defendants had, ceased and determined and at that point of time, that is, when the order has been made, they had nothing to dispose of. How then, say the plaintiffs, is there any basis for the defendants requiring a payment from us? The plaintiffs say "the public has done or suffered nothing which would "require the owners of the soil to pay something to the public. The "road has become useless, and this is the basis for its extinction, and, "therefore, there is no ground equitable or legal for taking from the "owner something more than he has already given."

Accordingly, they argue that the only matters to be considered by the defendants are:

(a) whether the stopping up is prejudical to the public interests;

(b) the way in which the vested property is to return to the abutting owners or as put by Mr. Nicholson—"they are not to throw the "matter down without making some arrangement about the "manner of the land going back to the adjoining owners."

There is, no doubt, weight in the arguments advanced on behalf of the plaintiffs but the words of section 52 are very wide, it says the Corporation may "vary, divert, or stop up wholly or partially any "such street, highway, footpath, or court. . . . on such terms as to the "vesting of the soil and other matters as may be agreed on between "the Corporation and the owners and lessees of buildings and lands "abutting on the street. . . ." It seems to me that these words are sufficiently wide to enable the Corporation to agree many kinds of terms to suit the occasion and circumstances. For example, it seems to me that it would be desirable that the Corporation should ensure that they were not leaving a legacy of law suits as to the boundaries of revested land in an irregularly shaped piece of ground, where there were a number of abutting owners; again, in the case of a diversion or variation they might agree a term that the abutting owners would provide the new piece of highway free of charge; or, again, as was suggested by Mr. Nicholson, a term might be included to provide compensation for extinguishment of a private right of way or other private right; such compensation would, presumably, be provided by the abutting owners and incorporated in the terms agreed for the revesting of the lands. The words are so wide that I do not consider they can be construed so as to prevent the Corporation from agreeing a term providing for payment to the Corporation for bringing about a "vesting of the soil" in the Entry, that is, for acting in such a way as to terminate the public rights in the Entry and revest it discharged

from these rights in the abutting owners. The Corporation, it seems to me, are under no obligation to make the order requested, but to do so would be of considerable financial benefit to the plaintiffs. The Corporation might well consider that it was not in the public interest to refrain from requiring payment of a sum of money for making an order which would extinguish the rights of the public in Orr's Entry or any other public street or place. That is, it was contended that, even if the order when made automatically revested the soil, yet before the order was made the Corporation were empowered to impose a term as to payment of money for acting under section 52 in order to bring an end to the public rights, and that this was a term of the agreement which came within the phrase "other matters." I think this may well be so.

There is a further point I should mention which was raised in argument. It was contended that the words of section 10 of the Act of 1878 of which the marginal note is "streets disused vested in Cor- "poration for sale" indicated that when the draftsman of the Act intended to vest a street in the Corporation in a manner which enabled them to dispose of it by sale he knew how to do so. Thus, as section 10 was limited to streets and pieces of ground becoming disused by reason of their abutting on the new works to be constructed under section 7 of the Act and was contained under a fasciculus of sections headed "Part III New Streets and Improvements," it was inapt to say that section 52, which is in a group of sections entitled "Part V "General Powers as to Streets and Buildings," could be construed as giving a power to dispose of land which, it was said, the Corporation were to all intents and purposes doing. My decision does not depend on any premise that section 52 gives a power to sell land. All counsel concerned found section 10 to be a puzzling section; my opinion as to its meaning is that the draftsman recognised that the streets and pieces of ground referred to in it were not being vested for the purpose of carrying out statutory duties, rights and powers and, therefore, not for an interest ending when the purpose ceased; they would be, when vested, pieces of ground not required for public use any longer, and, accordingly, the word "vested" would not be qualified in the way it was in *Rolls*' case[1] and the other cases discussed above. This idea is, perhaps, to some extent borne out by the observations of the court in the *Rolls*' case[2] when discussing the meaning of section 154 of the Metropolis Management Act, 1855, where it was sought to

[1] (1880) 14 Ch. D. 785. [2] Ibid. 799, 804.

hang a somewhat similar argument on the terms of section 154—an argument, indeed, which Jessel M.R., the judge of first instance, accepted.

Another point which I should mention is that it was argued for the Corporation that section 12 makes a "real" vesting, that is without any qualifications, because not only does it vest streets and such things, but also chattels such as lamps, lamp-irons, lamp-posts, implements, gravel, stones and other equipment, materials and articles. The chattels it is said must be absolutely vested, and it would be wrong in law to hold that the word in its application to streets caused a lesser interest to be vested. This, however, does not follow as of course, and it is not necessarily anomalous to hold that two different types of interest may be vested and, indeed, so far as this subject matter is concerned, the same point was present to the mind of the Court in *Rolls*' case[1], but the court nevertheless held that the vesting of streets was qualified, and on the strength of this I rejected the Corporation's argument on this point.

In order to give effect to this judgment I propose to amend the agreed questions submitted by the parties as follows:

(1) Add new sub-paragraph 1(b) (iii), "in the surface of Orr's Entry "and of and in an undefined depth below the surface so far as is "necessary for the discharge of their duties";

(2) In question 2 omit the word "or" after "1(b) (i)" and add after "1(b) (ii)", "or 1(b) (iii)";

(3) Add new sub-paragraph 3(c) "in the surface of Orr's Entry and "in an undefined depth below the surface";

(4) Add new sub-paragraph 4(b) (iv) "their estate or interest as "defined in question 1(b) (iii)."

The answers to the questions will be:

1. (a) (i) Doth not answer.
(ii) Doth not answer.
(b) (i) Doth not answer.
(ii) Doth not answer.
(iii) Yes. A determinable fee simple estate.

2. No.

3. (a) Doth not answer.
(b) Doth not answer.
(c) Yes.

[1] (1880) 14 Ch. D. at 794.

4. (a) (i) Does not arise.
(ii) Does not arise.
(b) (i) Doth not answer.
(ii) Doth not answer.
(iii) Yes.
(iv) Yes.

Order accordingly.

The plaintiff company appealed to the Court of Appeal against that part of the order of McVeigh J. which held that the order made by the Corporation might include a term providing for the payment to the Corporation of a sum of money.

Nicholson Q.C. and *Murray* for the appellant company. Although section 52 of the Act of 1878 is permissive, it does not mean that the Corporation may purport to sell an interest which it has not got. All that the Corporation has is a determinable interest in so much of the surface or "skin" of the street as is necessary for the purposes of the street, and as soon as the street ceases to be a highway it must revert to its original owner, leaving the Corporation nothing of which it can dispose. The charge which the Corporation is seeking to impose must therefore be imposed in respect of the making of the order stopping up the street. The fact that the charge will benefit the ratepayers of Belfast is not an argument for saying that without it the order might be prejudicial to the public interest.

The same principles are applicable to the levying of a charge by a local authority as to the levying of a tax by the Crown, and each must be supported by express statutory authority, or else it is ultra vires: see *Attorney-General v. Wilts. United Dairies Ltd.*[1]. A local authority may not demand payment in consideration of a granting of permission: *Mayor of Southwark v. Partington Advertisement Co.*[2]; *Liverpool Corporation v. Arthur Maiden Ltd.*[3]. See also *Morgan v. Palmer*[4].

The principles set out in *Attorney-General v. Wilts. United Dairies Ltd.*[1] were applied in *Brocklebank Ltd. v. The King*[5], a case of a demand for a payment in respect of a licence in connection with shipping control, and in *Reg. v. Bowman*[6] it was held that the imposition of a condition of payment for the granting of a spirit licence was wholly

1 (1921) 37 T.L.R. 884.
2 (1905) 69 J.P. 183.
3 [1938] 4 All E.R. 200.
4 (1824) 2 B. & C. 729.
5 [1925] 1 K.B. 52.
6 [1898] 1 Q.B. 663.

unjustifiable. See also the judgment of Farwell L.J. in *Rex v. Shann*[1] where he says: "It is not lawful for any committee or person to whom "powers are given by the Legislature for a specific and limited purpose "so to use such powers as to compel obedience to its wishes in respect "of matters outside those limits."

Where an authority has a discretion to impose conditions as it thinks fit, the court is entitled to investigate the decision of the authority to see whether it has taken into account matters which it ought not to have considered, and even if extraneous matters have not been taken into account, the court may still intervene if the authority has come to an unreasonable conclusion in the exercise of its discretion: *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation*[2].

The Act of 1878 itself shows that it was not intended that the Corporation should be entitled to impose a charge under section 52, because in other cases a specific power to impose a charge is given in the Act: see sections 59, 72, 75, 94, 111, 117 and 131. The whole approach of the Corporation shows that it took the view that it could sell its interest in Orr's Entry, and that is the basis upon which the charge is sought to be made.

Gibson Q.C. and *Moody* for the respondent Corporation. The position of a local authority differs from that of a public utility corporation so far as statutory powers are concerned. The powers of the latter are more strictly construed: *Galloway v. Mayor and Commonalty of London*[3]. If the exercise of a power by a local authority is challenged the onus is on the person doing so to prove that the authority has acted ultra vires: per Lord Cairns in *Attorney-General v. Mayor of Cambridge*[4].

This case is far removed from the principle that payment may not be levied without express authorisation. There is no question of taxation involved, for it is not correct to say that the land was bound to revert to the original owners, or to say that the Corporation had no estate or ownership in the land. The authorities establish that the Corporation had in fact the fee simple in the land: see per Evershed M.R. in *Tithe Redemption Commission v. Runcorn U.D.C.*[5]. The charge is in the nature of compensation for the release of the fee simple.

The terms of section 52 are wide enough to include the power to impose a condition requiring payment. The judgment of Slesser L.J.

[1] [1910] 2 K.B. 418, 435.
[2] [1948] 1 K.B. 223.
[3] (1866) L.R. 1 H.L. 34.
[4] (1873) L.R. 6 H.L. 303, 318.
[5] [1954] Ch. 383, 398.

in *West Midlands Joint Electricity Authority v. Pitt*[1] shows that a power to impose "terms" may include power to impose terms providing for the payment of money.

Section 52 refers to such terms as may be agreed between the parties, and this element of negotiation distinguishes the present case from *Liverpool Corporation v. Arthur Maiden Ltd.*[2]. Compensation is one of the "other matters" to be taken into account in relation to section 52. If a money payment may be included as a term of the order the amount of the payment may be related to the advantage to accrue to the owner: *Rex v. Drinkwater*[3].

Nicholson Q.C. replied.

Cur. adv. vult.

LORD MACDERMOTT L.C.J.: This suit relates to a court in the City of Belfast known as Orr's Entry. This Entry opened into High Street. It was a cul-de-sac and had for many years been a public highway. It finds a place in the official list of streets of the Borough in 1874 and from then at least the Corporation have repaired and maintained it. Formerly, the premises abutting upon it were in different hands. These premises were part of a block of buildings lying North of High Street and West of Bridge Street. In 1941 the buildings in the vicinity of the Entry were destroyed by enemy action and the site was afterwards cleared. When the present proceedings were commenced the site was still vacant, but by various assurances, which I need not particularise, the plaintiffs had become entitled in possession to the fee simple of the lands abutting on the Entry. The plaintiffs had acquired these lands with a view to building thereon, and on November 30, 1955, they applied to the Corporation under section 52 of the Belfast Improvement Act, 1878, requesting them wholly to stop up the Entry. On November 29, 1956, the Improvement Committee recommended that, subject to certain conditions, the Council should resolve to make an order pursuant to the said section "stopping up "wholly the said entry....on the basis that in the opinion of the "Council the stopping up thereof would not be prejudicial to the "public interests." The conditions referred to provided for the payment by the plaintiffs to the Corporation of the following sums:

(1) £1,666. 13. 4;

(2) £5. 10. 0. for the materials constituting the surface of the Entry

1 [1932] 2 K.B. 1, 44-5.
2 [1938] 4 All E.R. 200.
3 [1905] 2 K.B. 469.

other than two gulleys which were to be removed by the Corporation; and

(3) £20 for the alteration and removal of services in the Entry.

The Council adopted the Improvement Committee's recommendations on December 3, 1956. The plaintiffs, however, while not objecting to pay the items of £5. 10. 0. and £20, questioned the right of the Corporation to require payment of the sum of £1,666. 13. 4. which was demanded as one-third of the sum of £5,000, the estimated value of the land comprised in the Entry. This demand was not aimed specially at the plaintiffs. It followed a practice instituted by the Improvement Committee on July 25, 1883, by a resolution "that in "future the one-third of the value of the ground be accepted for such "courts as it may be decided to close."

On February 22, 1957, the plaintiffs issued an originating summons seeking the opinion of the court as to whether the Corporation had power to require payment of the said sum of £1,666. 13. 4. as one of the terms upon which the Council would make an order stopping up the Entry under section 52 of the Act of 1878. The summons was afterwards extensively amended and further questions were submitted in order to determine, inter alia, the estate or interest taken by the Corporation in the Entry under section 12 of the Belfast Improvement Act, 1845, and the effect on such estate or interest of a stopping up order under section 52 of the Act of 1878.

In the course of a considered judgment McVeigh J., after a careful examination of the authorities, came to the conclusion (a) that the property in the Entry which was vested in the Corporation by section 12 of the Act of 1845 was limited to the surface of the Entry and to an undefined depth below the surface extending so far as necessary for the discharge of the Corporation's duties in the maintenance and preservation of the Entry as a highway; and (b) that the property or interest in the soil of the Entry thus vested in the Corporation was determinable and endured only so long as the Entry remained a public street, lane or passage, and, accordingly, that the Corporation had no disposable estate or interest in the Entry. These conclusions and the answers based upon them seem to me to be well founded. They have been accepted by the parties and are not challenged in any way by the present appeal.

The last two questions in the amended summons are numbered 4 (b) (iii) and (iv). It is these questions that raise the issue under appeal. They ask whether on the true construction of section 52 the terms

therein mentioned would include, in relation to an order stopping up Orr's Entry, a term providing for the payment by the plaintiffs to the Corporation of a sum of money in respect of the Corporation's relinquishment of—

(iii) the public right of way so extinguished; or

(iv) the Corporation's estate or interest as defined in question 1 (b) (iii), that is to say,"in the surface of Orr's Entry and of and in "an undefined depth below the surface so far as is necessary "for the discharge of their duties."

Stated shortly, the problem thus posed is whether the Corporation had power under section 52 to demand payment of the sum of £1,666. 13. 4. as a condition of making the order sought. McVeigh J. held that the Corporation had such power and answered both questions 4 (b) (iii) and (iv) in the affirmative. The plaintiffs now contend that in law both these answers should have been in the negative.

This remains the only matter in dispute. We were informed by counsel that the order applied for by the plaintiffs had been made and that it was agreed that the said sum would not be exacted if the de-decision of McVeigh J. were reversed.

The material provisions of section 52 of the Act of 1878 are as follows:

"The Corporation may, on the application in writing of the owners "of at least three fourths in length of the land or buildings abutting "on any street, highway, footpath, or court, from time to time, by "order, vary, divert, or stop up wholly or partially any such street, "highway, footpath, or court, (if in the opinion of the Corporation "such variation, diversion, or stopping up shall not be prejudicial to "the public interests), on such terms as to the vesting of the soil and "other matters as may be agreed on between the Corporation and "the owners and lessees of buildings and lands abutting on the street, "highway, footpath, or court; and on any street, highway, footpath, "or court being so. . . . stopped up, all public and other rights of way "and other rights in, over, or on so much thereof as shall be stopped "up. . . . shall be absolutely extinguished. . . ."

As, on the view already accepted, the Corporation had no disposable interest in the Entry and lost such interest as they had when the stopping up order was made, it is clear that the sum in question cannot be regarded as the price of an interest transferred from the Corporation to the plaintiffs. The Corporation had no proprietary

interest to sell and it is plain that the basis on which the said sum was computed, namely, the value of the Entry site, was arbitrary and unrelated to the real nature of the transaction. It is, however, beyond doubt that the order will enure for the benefit of the plaintiffs and the case for the Corporation was, in brief, that section 52 was wide enough to justify the imposition of such a charge as a term in an order which would have this effect. The reasoning of McVeigh J. on this point appears in the following passage from his judgment:

> "The Corporation, it seems to me, are under no obligation to "make the order requested, but to do so would be of considerable "financial benefit to the plaintiffs. The Corporation might well "consider that it was not in the public interest to refrain from "requiring payment of a sum of money for making an order "which would extinguish the rights of the public in Orr's Entry "or any other public street or place. That is, it was contended "that, even if the order when made automatically revested the "soil, yet before the order was made the Corporation were em- "powered to impose a term as to payment of money for acting "under section 52 in order to bring an end to the public rights, "and that this was a term of the agreement which came within "the phrase 'other matters.' I think this may well be so."

The contention of the plaintiffs, on the other hand, was that nothing in section 52 justified the imposition of a money charge except in so far as the same had some direct connection with the transaction. The £5. 10. 0. for materials and the £20 for the alteration and removal of services were pointed to as examples of charges which had such a connection. But the demand for the sum of £1,666. 13. 4. was said by the plaintiffs to fall within a completely different category. It had, they submitted, nothing to do with the transaction and was nothing more than a fee. If the Corporation could charge this sum, the argument proceeded, they would be entitled to sell orders under section 52 for whatever price they thought fit to exact.

Section 52 confers a discretionary power. In exercising that power three conditions must be satisfied. These may be enumerated as follows:

1. An application for the exercise of the power must be made in writing by the owners of at least three fourths in length of the abutting frontage. This condition is fulfilled in the present case beyond any question of doubt;

2. The Corporation must be of opinion that the stopping up shall not be prejudicial to the public interests; and

3. The order must be "on such terms as to the vesting of the soil "and other matters as may be agreed on" between the Corporation and the frontagers.

Now it was said, on behalf of the Corporation, that while the Corporation had to be of opinion that the stopping up would not be prejudicial to the public interests, they could properly reach this opinion after taking into account the terms agreed with the frontagers as terms of the order. For example, the public interest might demand the dedication of an alternative way over the frontagers' lands or the acquisition of such a way by means of a charge levied on the frontagers, and when such terms were agreed the Corporation might then be satisfied that the stopping up would not be prejudicial to the public interests even though they would not have been so satisfied before. In this way, the argument continued, a monetary charge could be justified in order to make provision for public interests even though it had nothing else to do with the stopping up of the highway the subject of the order. This is an ingenious submission, but I do not think it accords with the proper construction of the section. The condition that the order shall not be prejudicial to the public interests seems to me to be annexed directly to the discretion and to go to the root of the whole matter. I think this is the grammatical reading of the section, and it is what one would expect having regard to the nature of the interests involved. It is one thing for a highway authority to close a highway when such a step will not prejudice the public, but quite another thing, as I see it, to make a stopping up order which will prejudice the public unless the frontagers and the Corporation agree on terms which, if implemented, will avoid that result. The Corporation do not represent the public at large, and though Parliament was obviously content that, for their own district, the Corporation should decide whether the stopping up of a highway would prejudice the public, I find it hard to believe that, in enacting section 52, Parliament ever intended to leave it to the Corporation to determine how the public interests were to be saved from the effects of a stopping up which would prejudice them. In my opinion, the second of the conditions I have enumerated is an independent condition, and unless it is satisfied I do not see how the powers of the section can be operated.

If this is so, it follows that the terms referred to in the section cannot include terms designed to avoid prejudicing public interests. What, then, is comprehended in the expression "on such terms as to

"the vesting of the soil and other matters. . . ."? The reference to the vesting of the soil is understandable. For example, even where the vesting in the Corporation has been under section 12 of the Act of 1845 the Corporation may want to remove some particular part of the surface—for instance the gulleys in this case—or, in order to obtain agreement between the frontagers, it may be necessary that they should arrange amongst them how and in whom the soil is to be vested. It is when one comes to the words "and other matters" that difficulty arises. In my opinion, the reference here is to other matters connected with or arising out of the transaction in question. I think the context supports an ejusdim generis construction, and further ground for that view may be found in two broader considerations. In the first place, it would be strange if the terms to be agreed could include stipulations quite extraneous to the subject matter of section 52. The nature of the agreement between the frontagers and the Corporation, which is contemplated by the section, may be very simple, but it may also have to deal with matters of some complexity. Frontagers, for instance, who are not parties to the application may be reluctant to lose the advantages of public access to their premises without compensation from those who make the application. But adjustments of that kind arise from the nature of the transaction, and though the category into which they fall must be wide enough to cater for a variety of circumstances, I can see nothing in that to suggest that the terms of agreement were intended to relate to anything and everything which the frontagers and the Corporation might happen to agree upon. And secondly, where Parliament confers upon a public authority a statutory power which is exercisable at its discretion, it is, in my opinion, well settled that the authority cannot lawfully impose or levy a money charge on a subject as a condition of exercising that power unless such charge is clearly authorised by statute either in express terms or by necessary implication. That principle, which seems to me to apply to local authorities no less than departments of state, has been recognised in numerous decisions, of which mention may be made of *Attorney-General v. Wilts United Dairies Ltd.*[1]; *Brocklebank Ltd. v. The King*[2]: and *Liverpool Corporation v. Arthur Maiden Ltd.*[3].

In the circumstances of the present case and for the reasons I have mentioned it is, in my view, impossible to relate the demand now in question to the transaction which was initiated by the plaintiffs' application for the stopping up of Orr's Entry. The demand made by

[1] (1921) 37 T.L.R. 884, 38 T.L.R. 781.
[2] [1925] 1 K.B. 52.
[3] [1938] 4 All E.R. 200.

the Corporation has nothing to do with the stopping up, or with any adjustment or situation arising thereout. It is clear from the resolutions I have cited that, apart altogether from this particular term, the Corporation were satisfied that the stopping up of the Entry would not be prejudicial to the public interests. Though it accords with a practice of some standing and for that reason cannot be regarded as discriminatory against the plaintiffs, this term is none the less really in the nature of a fee or levy demanded for the making of the order. As such, it is, in my view, outside the powers of the Corporation to impose. I would therefore allow the appeal and substitute for the answer given by McVeigh J. to each of the questions 4 (b) (iii) and (iv) the answer "No."

Black L.J.: I confess that I do not find section 52 of the Belfast Improvement Act, 1878 altogether an easy section, and one can readily imagine circumstances in which very difficult problems would arise upon an attempt to put the section into operation. As regards the matter with which the present appeal is concerned, I would be disposed to give a wider meaning than the Lord Chief Justice to the phrase "on such terms as to the vesting of the soil and other matters "as may be agreed on between the Corporation and the owners and "lessees of buildings and lands abutting on the street, highway, foot-"path, or court." In my view these words should not be read as disconnected from and irrelevant to the Corporation's decision as to whether the variation diversion or stopping up is or is not prejudicial to the public interest, and as to be referred to and considered only after the Corporation have arrived at that decision. Thus if the owner of the land on both sides of a public passage between two streets has set out a more convienient and commodious passage a few yards distant from the existing passage I do not see why the Corporation should not come to the decision that an order under section 52 stopping up the existing passage would not be prejudicial to the public interests if made upon the terms that the owner consented to dedicate the new passage to the public. And I would not exclude the possibility of cases arising where it would be legitimate to make an order having regard to certain financial terms. Indeed the present case is one of that type, for the propriety of the Corporation claiming the items of £5.10.0 and £20 has not been questioned.

As regards, however, the claim for £1,666. 13. 4, the matter appears to me to stand on a different basis than the claims for £5. 10. 0. and £20. This claim for £1,666. 13. 4, so far as I can see, can only be

justified either on the basis of being the price to be paid by the plaintiffs for the Corporation's interest in the passage, or else on the basis of a payment to the Corporation in consideration of the exercise by them of their powers under section 52.

With regard to the first of these suggested justifications, I think considerable assistance is to be obtained from the decision of the Privy Council in *Municipal Council of Sydney v. Young*[1]. For the facts and decision in that case I quote from the judgment of the Board delivered by Lord Morris[2].

"A local Act (51 Vict. No. 37) enabled the Secretary for Public "Works of Sydney, who is called the constructing authority, to form "a tramway. It became necessary in the making of the tramway to "take some 12 perches of a street leading from a particular named "place to a public park. The municipal authority of Sydney alleged "that by the taking of those 12 perches of this street they were entitled "to compensation under the Act, which of course entitles the owner "of the property to compensation. That of course depends on "whether the municipal authority of Sydney are the owners of the "street in any sense that would give them a claim for compensation. "The provision by which the property in the street in any respect "vests in them is under the Sydney Corporation Act of 1879 (43 Vict. "No. 3), which states that 'All public ways in the city of Sydney now or " 'hereafter formed shall be vested in the council, who shall have full " 'power,' and so on.

"Now it has been settled by repeated authorities, which were re- "ferred to by the learned Chief Justice, that the vesting of a street or "public way vests no property in the municipal authority beyond the "surface of the street, and such portion as may be absolutely necess- "arily incidental to the repairing and proper management of the "street. but that it does not vest the soil or the land in them as the "owners. If that be so, the only claim that they could make would be "for the surface of the street as being merely property vested in them "quâ street, and not as general property. Their Lordships are of "opinion that that is not the subject-matter of compensation, but the "street being diverted into a tramway is in no way a taking of property "within the meaning of the compensation to be assessed under the "Public Works Act of Sydney. In point of fact, it is rather the op- "posite, because the municipal authority, by getting rid of the street, "pro tanto have less expense, and it is in that respect a relief to the "ratepayers."

[1] [1898] A.C. 457.

[2] Ibid. at 458.

The principle of this decision is that whatever interest the highway authority have in the street it is not an ordinary proprietary interest which they can turn into money. Their ownership is not an ownership for the benefit of themselves as a Corporation or even for the benefit of the inhabitants of their own particular district. It is for the benefit of the public at large. Or as Lord Morris puts it, the property is merely vested in them quâ street, and not as general property.

Accordingly I must hold that the Corporation had no interest in Orr's Entry which they could sell and that the claim for the £1,666. 13. 4. cannot be justified as being a price to be paid for the Corporation's interest in the passage.

Nor in my opinion can this claim for £1,666. 13. 4. be justified as a payment to the Corporation in consideration of the exercise by them of their powers under section 52. The exercise of those powers by the Corporation is clearly permissive. Whether they should be exercised in any particular case is left by the Legislature to the judgment of the Corporation, and the Corporation could not, I conceive, be compelled by mandamus to exercise those powers. A layman might think that in a case such as the present where the making of the stopping up order is in the Corporation's discretion and has the effect of vesting absolutely in the plaintiffs, so that it can be built upon, a piece of ground the value of which appears to have been taken as being £5,000, it would not be unreasonable that the plaintiffs should be called upon to make a payment to the Corporation in consideration of their making the stopping up order. But the cases to which we were referred during the argument (*Attorney-General v. Wilts. United Dairies Ltd.*[1]; *Brocklebank Ltd. v. The King*[2]; *Liverpool Corporation v. Arthur Maiden Ltd.*[3]) establish that when a public body is entrusted with the exercise of statutory powers it is not entitled, as the price of exercising those powers, to exact payment from the persons whom the exercise of those powers may benefit unless Parliament has conferred in clear terms the right to exact payments.

I cannot find that the Corporation are in any clear terms given statutory authority to require payment in consideration of making stopping up orders under Section 52 from the persons benefiting under those orders, and accordingly I agree that Questions 4 (b) (iii) and (iv) should be answered "No."

1 (1921) 37 T.L.R. 884.
2 [1925] 1 K.B. 52.
3 [1938] 4 All E.R. 200.

CURRAN L.J.: The parties agree that the only question for determination is whether on the true construction of section 52 of the Belfast Improvement Act, 1878, the Corporation are empowered to include a term in their agreement with the plaintiffs providing for the payment to the Corporation by the plaintiffs of a sum of money in respect of the Corporation's relinquishment of:

(1) the public right of way extinguished by the order stopping up Orr's Entry; or

(2) their estate or interest, namely, a determinable fee simple, in the surface of Orr's Entry and of and in an undefined depth below the surface so far as is necessary for the discharge of their duties.

Under the said section the Corporation are empowered to make an order stopping up any street &c. "on such terms as to the vesting of "the soil and other matters as may be agreed on between the Cor- "poration and the owners and lessees of buildings and lands abutting "on the street...." By indenture of conveyance dated October 26, 1953, the plaintiffs became entitled in fee simple in possession to all the lands abutting on Orr's Entry and, subject to such public rights as existed by reason of the Entry being a public highway, to all the lands forming the site of the Entry. Certain subleases existed but have been duly surrendered and merged in the plaintiffs' estate in fee simple. Accordingly, any agreement under the said section has to be between the Corporation and the plaintiffs.

It is conceded on behalf of the plaintiffs that the word "terms" in the said section includes pecuniary terms, and no objection is made to those terms in their agreement with the Corporation whereby the plaintiffs agree to pay £5. 10. 0. for the materials of Orr's Entry (except the two gulleys which are to remain the property of and be removed by the Corporation): and £20 for the alteration and removal of the services in the said Entry. These items relate to materials owned by the Corporation and to be transferred to the plaintiffs and to expenses to be incurred and work to be done by the Corporation. The pecuniary terms in the present agreement and the other possible types of pecuniary terms one might visualise, where the circumstances are different, appear to be clearly authorised by the section if they are what might be described as commercial transactions. There would appear to be no objection in principle to the Corporation selling its road materials or requiring to be reimbursed for expenses which the Corporation will have to incur. It did not require section 52 to empower the Corporation to enter into such agreements. What that

section does is to empower the Corporation to incorporate such terms in the stopping up order and, presumably, to refuse to make the order if agreement on such matters cannot be obtained. In my opinion such agreements are clearly distinguishable from the mere imposition by the Corporation of financial burdens on the subject. The Corporation has no power to impose such burdens, unless the Legislature has given it such power in the clearest words. This principle is clearly set out by Scrutton L.J. in *Attorney-General v. Wilts. United Dairies Ltd.*[1] in the words quoted by Croom-Johnston J. in *Liverpool Corporation v. Arthur Maiden Ltd.*[2] as follows: "It is conceivable that Parliament, "which may pass legislation requiring the subject to pay money to the "Crown, may also delegate its powers of imposing such payments to "the executive, but in my view the clearest words should be required "before the courts hold that such unusual delegation has taken place. "As Wilde, C.J., said in *Gosling v. Veley*[3]. 'The rule of law that no " 'pecuniary burden can be imposed upon the subjects of this country, " 'by whatever name it may be called, whether tax, due, rate or toll, " 'except upon clear and distinct legal authority, established by those " 'who seek to impose the burthen, has been so often the subject of " 'legal decision that it may be deemed a legal axiom, and requires no " 'authority to be cited in support of it.' Particularly where the sums "to be paid to the Crown are to be paid as a condition of obtaining a "licence to exercise the ordinary rights of a subject should the clearest "words be required. In practice, legislation protecting certain acts "except on licence usually state the pecuniary terms on which licences "can be obtained."

I find no such clear words in section 52 of the 1878 Act. As I have already indicated, my opinion is that the Legislature in section 52 is not empowering the Corporation to enter into agreements or impose burdens it could not otherwise have entered into or imposed. It may be contended that when the section says "on such terms as to the vest- "ing of the soil and other matters as may be agreed . . . ." it is empowering the Corporation to agree as to the persons in whom the soil is to vest and that it could not enter into such an agreement were it not empowered so to do by the section. In my opinion this provision is only relevant where there are owners and lessees of buildings and lands abutting on the street &c. to be stopped up. They would presumably be concerned to agree as to which of them should have vested in them the soil released by the stopping up order, and on what terms.

1 (1921) 37 T.L.R. 884, 885.
2 [1938] 4 All E.R. 200, 204.
3 (1850) 12 Q.B. 328, 407.

The Corporation would be concerned to see that such agreement was reached before making the order. But the agreement would be primarily between the owners and lessees who, apart from the section, are the persons legally entitled to agree as to the vesting of the soil. Subject to such agreement once the order is made the soil vests by operation of law. Such vesting requires no agreement by the Corporation or anyone else.

If my opinion is right the final matter to be considered is whether in requiring the plaintiffs to make the payment referred to in question 4 (b) (iii) and (iv) in the originating summons, the Corporation is doing something it can legally do under its general powers or whether it is a mere imposition of a pecuniary burden. In other words, is the Corporation simply releasing or transferring its terminable fee simple interest for a pecuniary consideration or is it in substance imposing a charge for or selling the stopping up order. In my view the reality of this matter is that the Corporation is not empowered to make the order unless it is of opinion that the stopping up shall not be prejudicial to the public interests. If they are satisfied on this point it seems to me that the street in question must in reality be of no further use to the public—and in the present case that, in my opinion, is clearly the position. Indeed I believe it would be a liability. Prima facie, therefore, the Corporation has, in my opinion, a duty to make the order. No doubt, section 52 of the 1878 Act provides that the Corporation "may" make the stopping up order. But in my opinion they may nevertheless have a duty to make such an order. That opinion is supported by long standing authority. The relevant cases were reviewed by the House of Lords in *Julius v. Lord Bishop of Oxford*[1]. Earl Cairns L.C., after referring to the cases, says[2]: "My Lords, the "cases to which I have referred appear to decide nothing more than "this: that where a power is deposited with a public officer for the "purpose of being used for the benefit of persons who are specifically "pointed out, and with regard to whom a definition is supplied by the "Legislature of the conditions upon which they are entitled to call for "its exercise, that power ought to be exercised, and the Court will "require it to be exercised."

It is interesting to note the earliest case referred to by Earl Cairns L.C. which is that of *Alderman Backwell*[3] before Lord Keeper North. The creditors of Alderman Backwell petitioned for a commission of bankruptcy against him, and they would have been obviously exposed to

[1] (1880) 5 App. Cas. 214.
[2] Ibid. 225.
[3] (1683) 1 Vern. 152.

prejudice and hazard, if it had not been granted. The words of the statute were that the Chancellor "may grant a commission," and the Lord Keeper held that he was bound to exercise the power which was in effect reposed in him for the benefit of those who ask for its exercise. So in the present case in my opinion the power to make a stopping up order is reposed in the Corporation for the benefit of the persons designated in section 52 of the 1878 Act as "the owners of at least "three fourths in length of the land or buildings abutting on any "street, highway, footpath, or court....". In other words, in the present case, the plaintiffs; and there is no doubt that they would be prejudiced if the stopping up order were not made. Now as matters stand before the order is made the Corporation has no disposable interest in the soil of Orr's Entry. They could neither transfer nor release their interest. The only way in which their interest can be terminated is by the making of the stopping up order. If my opinion is right that the Corporation is under a duty to make that order it follows in my view that they cannot impose what would be tantamount to a charge for making it, unless expressly authorised so to do in the clearest words. I do not understand counsel for the Corporation as contending that such a power is given by section 52 of the 1878 Act; and as I have already stated, I am clearly of opinion that it does not do so.

I fully appreciate that the Corporation in seeking to impose a pecuniary burden on the plaintiffs believed that not only were they entitled to do so on the basis that they were agreeing to relinquish their rights in and on the soil of Orr's Entry; but that in the interests of the public, or at least of the ratepayers, they should do so. And I am satisfied that they sought to arrive at an amount which was reasonable to the plaintiffs. I find, however, that in substance what they were doing would have the effect of imposing a pecuniary burden on the plaintiffs without the necessary statutory power. The Corporation will no doubt find consolation in the fact that rates will now flow from an Entry which, as I have already said, would otherwise have been a useless liability.

I agree that the appeal should be allowed and that questions 4 (b) (iii) and (iv) should be answered in the negative.

Appeal allowed.

Solicitors for the plaintiff company: *C. & J. Black.*

Solicitor for the Corporation: *John A. Young.*

J.P.

SILER FARMERS' MART CO., LTD. v. SCOTTISH CO-OPERATIVE WHOLESALE SOCIETY, LTD. AND OTHERS[1].

Market franchise - Disturbance—Purchase of pigs and pig carcases outside market No possible concourse of buyers due to change in methods of marketing—Whether rival market.

The plaintiffs had exclusive market rights, including a right to tolls, in respect of a franchise market in the town of Enniskillen. For many years up to July 1948, the great majority of bacon pigs in Northern Ireland were sold dead and the market did a very substantial trade in pig carcases. It was the practice of curers from all parts of Northern Ireland to attend the market as purchasers. The dead pig market was held every Tuesday, when carcases were weighed and the market owners were paid tolls and weighing charges. The first-named defendant, the S.C.W. Society (hereinafter referred to as "the Society") was the principal purchaser and for some years had paid to the market owners a sum in lieu of tolls and weighing charges in respect of any carcases bought direct from the producers at the farms and which did not pass through the market.

About the year 1945 the Ministry of Agriculture, which was anxious to bring about a development of bacon pig production in County Fermanagh, encouraged the Society to embark on a considerable alteration and improvement of its premises in Enniskillen, including the building of its own abattoir, and the Ministry undertook to use the premises as the principal collecting centre in the county for live pigs and to employ the Society as agent for the allocation and distribution of carcases to other curers. This scheme came into operation in July 1948, after the appearance in the press of an advertisement informing pig producers of the opening of the new abattoir and announcing an arrangement whereby the Transport Board would collect live pigs at the farms at a special charge.

After the inception of the new scheme neither the Society nor the Ministry, nor any other curer or person authorised to purchase bacon pigs, attended at the plaintiffs' market, nor was any sum paid in lieu of tolls. All pigs of bacon weight were either collected pursuant to the Ministry's arrangement with the Transport Board or delivered at the new abattoir by the producers themselves. Dead pigs delivered by producers were also accepted by the Society at its premises. The plaintiffs brought proceedings claiming a declaration of their rights and damages and injunctions against the defendants and each of them on the grounds of disturbance of, and conspiracy to disturb, their market rights.

Held, by the Court of Appeal (Lord MacDermott L.C.J. and Black L.J., Sheil J. dissenting), affirming the decision of Curran J. on this point, that there was no disturbance in respect of live pigs purchased from producers by the Ministry and delivered at the Society's premises by the advertised transport facilities on the ground that the contracts for the sale of such pigs were made on producers' farms outside the market area;

[1] In the Chancery Division before Curran J.: March, 2, 3, 4, 7, 8, 29, May 16, 17, 18, June 8, 10, 13, 14, 1955; Feb. 22, 1957.
In the Court of Appeal before Lord MacDermott L.C.J., Black L.J. and Sheil J.: Nov. 7, 8, 11, 12, 13, 14, 15, 29, 1957; May 15, 1958.

Held, by the whole court, reversing the decision of Curran J. on this point, that the acts of the Society, the Minister of Agriculture, and the Ministry of Agriculture complained of by the plaintiffs amounted in law to the tort of disturbance in respect of (a) live pigs purchased by the Ministry and delivered at the Society's premises by producers, and (b) dead pigs sold by producers to the Society at the Society's premises.

Held, further, by the whole court, that the evidence did not support the allegation of conspiracy to disturb the plaintiffs' market.

Decision of Curran J. affirmed in part and reversed in part.

ACTION tried before Curran J.

The following statement of facts is adapted from the statement of facts agreed by the parties for the purpose of the trial of the action.

In 1947 the plaintiffs by conveyance became possessed of the exclusive right in fee simple by letters patent dated respectively May 28 in the 10th year of the reign of King James I and February 20 in the 53rd year of the reign of King George III to hold markets and fairs in or at Enniskillen in the County of Fermanagh and to exercise all the rights set forth in the said letters patent, and the plaintiffs at all times material to this action held twelve fairs in every year and a market each Tuesday and Thursday in every week in exercise of the rights conferred by the letters patent and of rights exercised by the plaintiffs and their predecessors in title from time immemorial or conferred by letters patent which had been lost or destroyed by accident.

Before 1934 the sale of live pigs for slaughter was unknown. The market in Enniskillen was a dead pig market, the system being that pig producers either brought their pigs dead to the market on Tuesday or brought them alive to the town on Monday and had them slaughtered and sold dead in the market on Tuesday. All the carcases were weighed by a weighmaster employed by the proprietors of the market, who received from the sellers a market toll of 2d. per pig and a weighing charge of 6d. per pig. Any dealings in live pigs took place at the monthly fair: such pigs were not sold for slaughter.

Under the provisions of the Agricultural Marketing Act (Northern Ireland), 1933, the Pigs Marketing Board was established for the purpose of buying live pigs from producers and selling them to curers. This Board had a monopoly of the purchase of live pigs of bacon weight. In or about the year 1934 the Board established collecting centres to which producers brought live pigs which they had for sale, but the trade done by the Board in County Fermanagh was very small and the market in Enniskillen in dead pigs was pract-

ically unaffected by its operations. Curers from all parts of Northern Ireland continued to attend and purchase pig carcases up to July 1948. In or about 1934 Mrs. Browne, the plaintiffs' predecessor in title to the Enniskillen market, came to an arrangement with the Board which was dispatching some pigs to curers and for shipment by rail from Enniskillen, that she would weigh such pigs and accept a payment of 2d. per pig in lieu of any claims she might have to market tolls.

On October 26, 1939, by request of the Ministry of Food the Ministry of Agriculture for Northern Ireland undertook certain duties of the Ministry of Food under the Defence Regulations, 1939. These powers of the Ministry of Food under the Defence Regulations were continued by the Supplies and Services (Transitional Powers) Act, 1945. By virtue of S.R. & O. 1940, No. 39, made under the Defence Regulations, the Ministry of Agriculture became the only person authorised to purchase in Northern Ireland live pigs for slaughter. The Ministry thereupon took over the Pigs Marketing Board's organisation, continuing to make the payments of 2d. per pig dispatched live from Enniskillen in accordance with the arrangement made by the Board with Mrs. Browne. However, the number of pigs so dealt in by the Ministry continued to be small. The bulk of the pigs continued to be sold dead in the traditional manner to curers, principally to the first-named defendants, the Scottish Co-operative Wholesale Society (hereinafter referred to as "the Society"), which were the owners and occupiers of a bacon curing factory in the town of Enniskillen.

About the year 1920 the Society commenced purchasing dead pigs on farms without objection by the owners of the market. At first all such pigs were brought as carcases to the market where they were weighed and recorded and tolls paid in respect of them, but later by arrangement certain carcases were delivered direct to the Society's premises and an official of the Society weighed the carcases so delivered and made a return to the owners of the market, and a payment of 6d. per carcase was made in respect of them. In 1946 by arrangement the Society commenced collecting live pigs at the farms and brought them to the market premises were they were slaughtered. Under this arrangement the owners of the market kept the pluck and offal instead of making the usual charge for slaughtering. The pluck and offal were then usually sold to the Society. In addition the Society paid the owners of the market 6d. per pig.

In 1945 and 1946 the Society negotiated with the Ministry with a view to getting the necessary permission and licences to build and

operate an abattoir of their own. The Ministry encouraged the Society to embark on a much larger programme including enlarged storage space with refrigeration and modern machinery for carcase cleaning and other processes. In consideration of their doing so the Ministry undertook to use the Society's premises as the principal collecting centre for County Fermanagh and to employ the Society as the Ministry's agents for the allocation and distribution of chilled carcases to other curers in Northern Ireland. The owners of the market were not consulted in these negotiations.

The extended premises of the Society were opened on July 15, 1948, and on the same date the Ministry's collecting centre was transferred to these premises. Also on the same date the Society, with the knowledge and approval of the Ministry, caused to be published in the public press a notice to pig producers stating that the new premises were being opened as an official live pig receiving depot which would provide for the acceptance of live pigs from producers in County Fermanagh and part of County Tyrone, that live pigs would be uplifted and conveyed direct from farm to abattoir at an "all-in" reduced charge by the Transport Board, and that all producers had to do when the pig was ready for slaughter was to notify by postcard or telephone the Society, or the Transport Board, or Mr. T. M. Noble (the fourth-named defendant), or Mr. W. R. Thompson (the fifth-named defendant), or Mr. F. Donnelly. The notice added that the Society were still prepared to accept farm killed pigs delivered at the producer's expense at their premises.

On July 23, 1948, the plaintiffs wrote to the Ministry asking its intentions as to tolls. The Ministry in reply stated: "In reply to your "letter of 23rd July, I am directed by the Ministry of Agriculture to "inform you that the Ministry is advised that in the circumstances "under which it is now purchasing pigs for slaughter no toll is payable "to your Company, and, therefore, the question raised by your letter "does not arise." A further letter from the Chief Crown Solicitor stated: "The Ministry is advised that because pigs are not brought to "the market for slaughter or weighing that tolls are not payable." The Society also wrote to the plaintiffs saying that they did not now purchase live pigs for slaughter, that these were purchased only by the Ministry, and that questions of tolls on the purchase of pigs, etc. did not arise as far as the Society was concerned.

From July 1948, to the end of October 1950, the practice in relation to the sale of pigs was as follows. A producer wishing to sell

live pigs for slaughter notified a collecting agent (who was acting as agent for the Ministry) that he had such pigs for slaughter, whereupon the agent informed the local office of the Transport Board (and subsequently the office of the Ulster Transport Authority) of the name and address of the producer and the number of pigs which he wished to sell. The agent also told the producer that he had so informed the Transport Authority and the Transport Authority's agents subsequently collected the pigs and gave a receipt. The pigs were then taken to the Ministry's collecting centre on the Society's premises. A flat rate of 8d., later increased to 1/-, was deducted from the price of the pigs in respect of carriage to the collecting centre. From October 31, 1950, the collecting procedure was altered. The service of collecting agents was dispensed with and producers wishing to sell live pigs were required to obtain an entry form and to notify the Ministry by post. The Ministry subsequently notified the Transport Authority of the number of pigs and the addresses from which they were to be collected. Producers wishing to transport their own pigs to the collecting centre were required to notify the Ministry of the number of pigs which they wished to sell, and the Ministry then gave instructions to the producers as to the collecting centre to which the pigs were to be sent and the time at which they were to be delivered. Delivery by the producer at the collecting centre accounted for approximately 20% of the live pigs for slaughter purchased by the Ministry.

On arrival at the collecting centre the pigs were slaughtered by the Society's employees. At first, while the Society was a roll and ham curer, the slaughter was undertaken by the Society on behalf of the Ministry and the Society subsequently purchased the carcases, but when the Society turned over to Wiltshire curing in June 1952, the pigs became the property of the Society before slaughter and were thereafter slaughtered by the Society on its own behalf.

Live pigs purchased at Enniskillen by the Pigs Marketing Board, and subsequently to January 1940, by the Ministry, were until July 17, 1948, sold to Wiltshire curers outside Enniskillen upon terms which included the condition that the curers took delivery of the pigs when they were loaded on to railway wagons at Enniskillen. Since July 19, 1948, any live pigs at the collecting centre which were surplus to the requirements of the Society were removed by rail by the Ministry for sale elsewhere. A small number of pig carcases were still taken direct to the Society's premises by producers. No payments in respect thereof have been made to the plaintiffs since July 19, 1948.

The Society's premises were not at any material time open to the public, except to the extent that the Society and the Ministry were at all material times ready and willing to receive thereat live pigs and pig carcases which members of the public wished to sell. Since July 19, 1948, as a consequence of the above arrangements, neither the Society nor the Ministry had attended the plaintiffs' market, and no person attending there has been able to sell pigs of bacon weight by reason of the absence of the Society and the Ministry, or to sell pig carcases because of the absence of all persons authorised to purchase.

The plaintiffs in this action claimed: (a) a declaration that they were legally entitled to the sole rights to hold fairs and markets in Enniskillen and to charge reasonable tolls on all merchandise, commodities and live stock coming to the said fairs and markets; (b) a declaration that the Society, the Ministry of Agriculture, the Ulster Transport Authority and three persons whose names had appeared in the advertisement had disturbed the plaintiffs in their said rights by the levying of a rival market and otherwise; (c) a declaration that the acts of the Ministry in advising, arranging and providing for the transport and delivery of pigs to the Society's premises and the purchase and sale of pigs therein were ultra vires the Ministry; (d) an injunction restraining the said disturbance, and in the case of the Ministry the continuance of the acts complained of; (e) damages for disturbance and conspiracy to disturb the plaintiffs' rights; (f) an account of all the moneys due and owing to the plaintiffs by the defendants as tolls.

Patton Q.C., *McVeigh Q.C.* and *Kelly* for the plaintiffs.

Nicholson Q.C., *Jones Q.C.* and *Lowry* and *MacDermott* for the defendants other than the Ulster Transport Authority.

Harrison Q.C. and *Gibson* for the Ulster Transport Authority.

Cur. adv. vult.

CURRAN L.J.: It is admitted by all parties to these proceedings that the plaintiffs have the exclusive right in fee simple by letters patent to hold markets and fairs in or at Enniskillen, and to exercise all the rights, including the right to receive tolls, set forth in the said letters patent. It is further admitted that the plaintiffs have at all times material to this action held twelve fairs in every year and a market each Tuesday and Thursday in every week in exercise of the rights conferred by the said letters patent and of rights exercised by the

plaintiffs and their predecessors in title from time immemorial or conferred by letters patent which have been lost or destroyed. No restrictions are imposed by the said letters patent as to what commodities may be marketed. So far as pigs are concerned it is admitted that prior to the year 1934 the sale of live pigs for slaughter was unknown. The market in Enniskillen was a dead pig market. In these circumstances Mr. Nicholson contends that the franchise does not apply to live pigs for slaughter. In my opinion, this contention is not well founded. Where the franchise does not impose any restrictions as to what commodities may be sold in the market, I see no reason for presuming that any such restriction is imposed by the fact that fashions, or the method of trading, have changed, and that pigs for bacon are now sold alive instead of dead. Such a change in fashion or method might result, of course, in a falling off in the sales in the market, or even in such sales coming to an end. As Mr. Nicholson very properly pointed out, trading can be legitimately carried on without going to the market. In the present case it is not in dispute that from July 19, 1948, the plaintiffs' market in pig carcases has gone, and they have not had any benefit from the sales of live pigs for slaughter as such sales have all taken place outside the plaintiffs' market. Is this state of affairs merely the result of a change in fashion, or method, in the pig industry and of legitimate trading, or are the plaintiffs right when they allege that it is due to the wrongful disturbance of their market by the defendants? These are the interesting questions I have now to consider.

[His Lordship then set out the facts and continued:] From the foregoing facts it is clear that the plaintiffs' market rights in pig carcases have been rendered valueless, and the plaintiffs have been unable to participate in the marketing of live pigs for slaughter, and it is equally clear that these consequences are the direct result of the scheme introduced by the Ministry of Agriculture and carried out with the co-operation of the Society and the Northern Ireland Road Transport Board and its successor, the Ulster Transport Authority. The plaintiffs were excluded from this scheme, and their entitlement to receive any benefit therefrom was denied by the Ministry. The Society, a participant in the scheme at the request of the Ministry, left it to the Ministry to deal with the plaintiffs; and the Ulster Transport Authority, which co-operated by providing the necessary transport, was not approached by the plaintiffs on the question of the market rights.

I have not gathered from the arguments of plaintiffs' counsel that

it is suggested that the scheme sponsored by the Ministry was, as such, ultra vires the Ministry. As I understand the plaintiffs' contention it is this. The Ministry is a legal persona, as are the Society and the Ulster Transport Authority. These three persons and certain individuals:—

(1) conspired together to commit a tort—namely, to disturb the plaintiffs' market.

(2) in fact committed a tort by disturbing plaintiffs' market:

(a) by setting up a rival market at the Society's premises in Enniskillen;

(b) by intercepting live pigs which would otherwise have been sold in the plaintiffs' market, and preventing the same from coming to the plaintiffs' market.

Mr. Patton in his able argument for the plaintiffs contended that a conspiracy to commit a tort is itself a tort—that the tort lies in the agreement, and that no intention to injure is required. But in as much as the defendants concerned have carried out what they agreed to do, a decision as to whether their acts were tortious or not must necessarily determine whether the agreement to do those acts was a tort, if Mr. Patton's contention is well founded. What I propose to do, therefore, is to examine in some detail what the defendants concerned have done, and arrive at a conclusion as to whether the plaintiffs' market has been thereby wrongfully disturbed.

I again turn to the agreed facts.

[His Lordship referred to the facts leading up to the inception of the new scheme for marketing pigs which came into operation in July 1948, and continued:] Under the scheme as advertised by the Society with the approval of the Ministry live pigs produced in the area may be delivered to the Ulster Transport Authority at the producers' premises, and the price is ascertained (making allowance for any injury in transit) by weighing after delivery at the Society's premises in Enniskillen. I am of opinion on the facts before me that the producer, when he has delivered his pigs to the Ulster Transport Authority, has done all he is required to do to effect delivery to the Ministry, and that from that point the pigs are at the risk of the Ministry. I do not find any material distinction that could affect the case between this procedure and the Ministry sending its own lorries to take delivery of the pigs at the producers' premises. There are two other methods open to the producer. He may himself deliver live pigs

to the Ministry at the Society's premises at Enniskillen and so save the charge for transport; or he may slaughter pigs and deliver the carcases to the Society at their premises in Enniskillen, they being curers and authorised to purchase pig carcases.

So far as live pigs for slaughter are concerned the producer can only sell to the Ministry. He can obtain no benefit from taking his live pigs to the market. The main benefit a seller obtains from a market is that it provides a concourse of buyers. A seller is not obliged to bring his commodity to a market. He may sell it at his own premises or elsewhere, provided he does not do so in such circumstances as wrongfully to disturb the market. A fortiori, a producer, in my opinion, is not obliged to bring his live pigs to the market when the question of finding a buyer is out of his hands, and all he has to do is to make delivery to the pre-ordained purchaser, namely, the Ministry.

In the case of pig carcases there is this difference, there are a number of curers who are authorised to buy, and prior to July 19, 1948, they, in fact, attended the Enniskillen market on Tuesdays and, although there was a fixed price, they selected and purchased pig carcases. Since the Ministry's scheme was introduced it appears that the Society have been the sole purchasers of pig carcases in Enniskillen and have made their purchases, not in the market but at their own premises. This falling off in trade in the market may to some extent be accounted for by a change in curing methods of which evidence has been given. I do not propose to deal with this aspect as I am satisfied that apart from such change in method the market in pig carcases has been affected by the operation of the Ministry's scheme. So far as live pigs for slaughter are concerned it is my opinion that the operation of the scheme does not constitute a wrongful disturbance of the plaintiffs' market. So far as pig carcases are concerned the plaintiffs rely, inter alia, on the notice published on July 15, 1948, and other dates in the following terms: "In the meantime the "S.C.W.S. are still prepared to accept farm killed pigs delivered at "producers' expense to their premises. These will be paid for at "current official prices for dead pigs." It is set out in the agreed statement of facts that the bringing of pig carcases to the Society's premises by producers is independent of any scheme or arrangement made by or with the Ministry. I must accept this as a fact and regard the notice referred to as the sole responsibility of the Society. As its form suggests the notice is to let producers know that the practice of dealing in pig carcases between producers and the Society would continue. This practice was agreed to by the market owners, as we

have seen, subject to payments in the nature of tolls by the Society to the market owners. In these circumstances, in my view, the publication of the notice and the acts done in pursuance thereof do not assist the plaintiffs in these proceedings—whether they have a claim in contract against the Society, I do not determine.

The plaintiffs further rely on the fact that producers no longer bring their live pigs to the market to be slaughtered and sold as pig carcases to curers authorised to buy, and that curers no longer attend the market to buy any pig carcases that producers might bring there for sale. I have still to consider the contention that a rival market has been set up at the Society's premises; apart from this, the basis of the plaintiffs' claim is that producers and curers no longer attend the market because the live pigs that would have been taken to the market to be slaughtered and sold as pig carcases are wrongfully intercepted and prevented from coming to the market.

I have already absolved the defendants from any wrongdoing in the case of live pigs for slaughter sold to the Ministry, the only possible buyer. In doing so, I have assumed that the producers had no intention of taking such pigs to the market. The other possible basis for the plaintiffs' claim is that the defendants intercepted live pigs that would have gone to the market to be slaughtered, and sold to curers as pig carcases, and so prevented them being taken to the market. This suggests pressure on producers who intended taking pigs to the market, to prevent them doing so; or collusion between the defendants, or some of them, and the producers, to side-track the market and avoid payment of tolls. The evidence in my opinion does not disclose the existence of either of these elements. The facts of the present case are very different from those in *Loughrey v. Doherty*[1] or in any of the cases referred to as illustrating this type of disturbance of markets.

There remains to be considered the plaintiffs' contention that a rival market has been set up at the Society's premises in Enniskillen. As between the producers and the Ministry, the Society's premises, part of which for this purpose are rented by the Ministry, are merely a receiving centre. As between the producers and the Society, in the case of pig carcases, it may be that these are purchased and sold at the Society's premises, but the only buyer is the Society and the carcases are brought to the premises by the producers for the purpose of selling them to the Society only. I do not find in any of these

[1] [1928] I.R. 103.

activities the elements of a rival market. After the live pigs for slaughter have been delivered at the Society's premises a further transaction takes place. While the Society was a roll and ham curer it slaughtered pigs on behalf of the Ministry, and purchased the carcases. Since the Society turned over to Wiltshire curing in June 1952, the pigs become the property of the Society before slaughter and are then slaughtered by the Society on its own behalf. The allocations of pig carcases and, now, live pigs, by the Ministry to the Society are made by the Ministry, presumably in Belfast, and carried out on the Society's premises; but as appears from the agreed facts it is agreed that no bargain is made on the premises with regard to pigs brought in alive to the said premises. Again, I cannot find in such transactions the elements of a rival market.

Mr. Patton referred amongst many other cases to *Wilcox v. Steel*[1] and pointed out that in that case there was only one seller yet it was held by the Court of Appeal to be a rival market. To demonstrate how different the facts of that case are from those of the present case I quote from the judgment of Romer L.J.[2]: "In the present case the "facts are shortly these. The defendant is not in the position of an "ordinary member of the public in doing what he has done. He is not "selling his own goods, but he is an auctioneer and is selling horses at "a commission, in the usual way at public auctions, upon certain "ground of his own which he has close to the market—so close in fact "that the public attending the market could walk across. He did that "upon a market day, and he had advertised that he would hold sales "upon that day both in the market and upon his own ground. In my "opinion, what he was doing was establishing a rival market. . . ."

In my view not only does that case not help the plaintiffs, but it emphasises how far removed the activities carried on at the Society's premises are from what constitutes a rival market.

Pigs at the Ministry's receiving centre that are surplus to the Society's requirements are not sold at the receiving centre, they are removed by the Ministry elsewhere, so that the question of a rival market so far as those pigs are concerned does not arise.

Even if one adds together all the activities carried on at the Society's premises they do not, in my opinion, constitute a rival market. As the plaintiffs have not, in my opinion, established any wrongful disturbance of their market it is unnecessary to consider the other contentions put forward on behalf of the defendants.

[1] [1904] 1 Ch. 212. [2] Ibid. 222.

It is unfortunate that the Ministry did not find itself able to carry out the proposals it had itself put forward, or some other suitable proposal, to compensate the market owners, and that the Society has not thought fit to pursue the course it had previously followed with regard to the plaintiffs' franchise and the payment of tolls.

Having regard to the conclusion I have arrived at on the facts of the case, I must give judgment for the defendants, but in all the circumstances it will be without costs, except to the Ulster Transport Authority who were brought into these proceedings rather abruptly, and who, in my opinion, have a clean bill on the merits.

Judgment for the defendants.

The plaintiffs appealed to the Court of Appeal.

Patton Q.C., *Brown Q.C.* and *Kelly* for the appellants. Disturbance is a tort and whether or not disturbance has taken place in any particular case is a question of fact: *Manchester Corporation v. Lyons*[1]. Even though not technically a market the setting up of a rival place of sale may have the effect of depriving the market owners of the benefit of their franchise: *Goldsmid v. Great Eastern Railway Company*[2]; *Mayor of Dorchester v. Ensor*[3]. It is not necessary to show an intention to evade tolls if the facts amount to the levying of a rival market: *Wilcox v. Steel*[4]. In that case there was only one seller. The position is stronger in support of the existence of a rival market where there is only one buyer and many sellers. *Yard v. Ford*[5] shows clearly that it is not necessary to take advantage of the actual concourse present at the market. Any user of land which provides the public with the means of selling their goods without bringing them to the market can be a disturbance: *Corporation of Cork v. Shinkwin*[6]; *Marquis of Downshire v. O'Brien*[7]. An action for disturbance by the levying of a rival market will lie although the rival market is not held on the same day: *Yard v. Ford*[5]; *Elwes v. Payne*[8]. In such a case actual damage must be proved, but when the market is held on the same day it is a disturbance by intendment of law and it is not necessary to prove damage: *Morpeth Corporation v. North-*

1 (1882) 22 Ch.D. 287.
2 (1883) 25 Ch.D. 511.
3 (1869) L.R. 4 Ex. 335.
4 [1904] 1 Ch. 212.
5 (1670) 2 Wm. Saund. 172.
6 (1824) Smith & Batty 395.
7 (1887) 19 L.R. Ir. 380.
8 (1879) 12 Ch.D. 468.

umberland Farmers' Auction Mart Co., Ltd.[1]. In *Hailsham Cattle Market v. Tolman*[2] the prohibition applied to market days only. The authorities on the necessary elements of a rival market are reviewed in the judgments in *London Corporation v. Lyons*[3]. Buying of goods which would otherwise go through the market is a disturbance: *McCutcheon v. Carney*[4]. It is not suggested that there is anything to prevent a man from taking his goods out of the market area and selling them elsewhere, but that is quite a different thing from systematically combining with other persons so that the market is sidetracked.

The scheme worked out between the defendants amounted to a conspiracy to deprive the market of its franchise rights. The facts show that the pigs which were the subject of the scheme would otherwise have come through the market in the ordinary way. The object of the Ministry was to induce the farmers to change their system of marketing, and with the assistance of the Society and the Road Transport Board a scheme was evolved which would prove very attractive to the farmer. It would have been a very different thing if the scheme had left the farmers to make their own arrangements for transport. Whether or not the Crown can conspire there is no doubt that the Minister can, and the admitted facts show a clear conspiracy to disturb the plaintiffs' market which is a wrongful act. The tort of conspiracy was committed when the agreement was entered into and it is irrelevant whether or not any evidence is adduced to show that the conspirators gained by their conspiracy. No doubt it is necessary because it is an action on the case that the plaintiff should show damage, but it is only from that point of view that something must be shown to have been done in pursuance of the agreement. "A con-"spiracy consists of an unlawful combination of two or more persons "to do that which is contrary to law, or to do that which is wrongful "and harmful towards another person. It may be punished.... "civilly by an action on the case in the nature of conspiracy if damage "has been occasioned to the person against whom it is directed": per Lord Brampton in *Quinn v. Leatham*[5]. Conspiracy involves the consent of two or more persons and their agreement is *an act* in advancement of their intention: *Mulcahy v. Reg.*[6]; *Reg. v. Brailsford*[7]. A conspiracy is unlawful and therefore actionable if it has an unlawful object: *Davies v. Thomas*[8]. Injury caused by the act of two or more

1 [1921] 2 Ch. 154.
2 [1915] 1 Ch. 360.
3 [1936] Ch. 78.
4 [1938] Ir. Jur. Rep. 73.
5 [1901] A.C. 495, 528.
6 (1868) L.R.3 H.L.306.
7 [1905] 2 K.B. 730.
8 [1920] 2 Ch. 189, 202.

persons gives rise to a right of action if the intent or motive was to injure: *Sorrell v. Smith*[1], but intention is irrelevant where there is a conspiracy to do an act in itself unlawful, or to do a lawful act by unlawful means. Disturbance of a market is unlawful whether you mean to disturb it or not. In *Crofter Hand Woven Harris Tweed Co. Ltd. v. Veitch*[2] the plaintiff failed because there was no conspiracy to injure and since the means employed were neither criminal nor tortious in themselves, the combination was not unlawful. That case illustrates the difference between conspiracy to injure and conspiracy to do an unlawful act.

The defendants have pleaded that since the making of the Pigs (Sales) (Northern Ireland) Order, 1940, it was not lawful for any person to sell or offer to sell or buy or offer to buy any pigs for slaughter or any pig carcases without a licence and that consequently the rights of the plaintiffs to insist upon the sale of such pigs and carcases within their market had ceased. The courts, however, should not be astute to interpret an order as taking away rights in the absence of unequivocal language: *Central Control Board v. Cannon Brewery*[3]. The Order has not the effect alleged in the pleadings. It cannot be said that it appears "by express words, or by plain implication" that the Legislature intended to extinguish the plaintiff's rights: *Western Counties Railway Co. v. Windsor and Annapolis Railway Co.*[4]; *Commissioner of Public Works (Cape Colony) v. Logan*[5]. For instance, in *Attorney-General v. Horner*[6] it was held that the Paving Acts should be interpreted so as to be consistent with the existence of market rights.

Nicholson Q.C., *Jones Q.C.*, *Lowry Q.C.* and *MacDermott* for the defendants other than the Ulster Transport Authority. A market franchise is an exclusive right to have a concourse of buyers and sellers to dispose of commodities in respect of which the franchise is given: *Marquis of Downshire v. O'Brien*[7]. The franchise owner has a monopoly of market services to the public, and providing facilities for the purchase and sale of goods from and to the public. Sale in this sense means exposure for sale to the public: *Mayor of Brecon v. Edwards*[8], Pease & Chitty on Markets and Fairs.

As a result of the marketing legislation live pigs for slaughter and pig carcases are not a commodity which a concourse of buyers and

1 [1925] A.C. 700, 723.
2 [1942] A.C. 435.
3 [1919] A.C. 744, 751.
4 (1882) 7 App. Cas. 178, 188.
5 [1903] A.C. 355.
6 (1884) 14 Q.B.D. 245.
7 (1887) 19 L.R. Ir. 380.
8 (1862) 1 H. & C. 51.

sellers can buy and sell. The price is fixed, and only one person can buy. There can be no competition and no ebb and flow of price. The commodity is no longer vendible in a free market. The market services cannot be lawfully rendered and are no longer necessary in respect of such commodities. This is fatal to the present action. The complaint of the appellant lies against the legislation, and not against any act of the respondents. A franchise owner runs the risk of changes of circumstances which render market services useless: *Hopkins v. Great Northern Railway Company*[1], and compare 'new traffic' cases in ferry franchise which is recognised as analogous to a market franchise: *Hammerton v. Dysart*[2].

There never was a market for live pigs for slaughter in the appellants' market; such pigs are not a commodity to which the franchise ever extended, nor were facilities provided for the purpose.

Even if live pigs for slaughter and pig carcases are commodities to which the franchise still applies, there has been no actionable disturbance. Such an action lies only—(1) where a rival market has been levied, and, (2) by acts falling short of a rival market. In the latter case a plaintiff must show that the benefit of the market has been taken. This means taking advantage of the existence of a market— making use of the concourse of buyers and sellers created by the market.

As to (1) the levying of a rival market consists in doing the very thing which the franchise owner has an exclusive right to do: *Hopkins v. Great Northern Railway Company*[1], *Corporation of London v. Lyons*[3]; that is, to invite the public to come and buy and sell in a place where facilities are provided for the purpose: *Goldsmid v. Great Eastern Railway Company*[4]. No rival market has been set up by the respondents. No marketing services are rendered to the public at the collecting centre. There is no concourse of buyers and sellers, and no invitation to the public to come and buy and sell there. The price is fixed and the purchase is predetermined. There is no exposure for sale, and if there were it would be unlawful: *Newtownards U.D.C. v. Tweedie*[5], *Lambert v. Rowe*[6].

As to (2), short of levying a rival market, the acts complained of must take a benefit from the market in order to be actionable: *Mayor*

1 (1877) 2 Q.B.D. 224.
2 [1916] 1 A.C. 57.
3 [1936] Ch. 78, 141.
4 (1883) 25 Ch.D. 511.
5 (1907) 41 I.L.T.R. 23.
6 [1914] 1 Q.B. 38.

of Brecon v. Edwards[1]; *Tewkesbury Corporation v. Bricknell*[2]; *Bridgland v. Shapter*[3]; Gunning on Law of Tolls, p. 82. No benefit of the market is taken because it has no benefit to offer. There is no concourse of buyers and sellers to attract from the market. There are no market services of which the public can take advantage. The acts complained of are simply the delivery of goods to the only person who can buy them at private premises. Alternatively, if a sale takes place at such premises, it is a sale to the sole lawful buyer at a fixed price. There can be no benefit of the market taken in these circumstances.

The cases relied on by the appellants support the respondents' contentions. When Cotton L.J. said in *Goldsmid v. Great Eastern Railway Company*[4] that "it is not necessary it should be in fraud of "the market or that it should take advantage of the market," he was not dealing with the tort of disturbance in general, but only with the case of the levying of a rival market. Contrast *Loughrey v. Doherty*[5]; *London Corporation v. Low*[6]; *Manchester Corporation v. Lyons*[7]; *Goldsmid v. Great Eastern Railway Company*[8].

Wilcox v. Steel[9], relied upon as a case of rival market with one seller was a case of an auctioneer acting for a number of sellers, and there was the question of diverting the concourse assembled in the market.

As to the prohibition contained in the charter, this did not apply to the Tuesday market, or to the livestock in the Thursday market. The expression 'for sale by retail or in parcels' is not an appropriate one to apply to the sale of livestock: *Treacher v. Treacher*[10]; *Phillips v. Parnaby*[11]; *Maguire v. Porter*[12]. A prohibition in a charter is void if it purports to give greater protection than is afforded by the common law: *Re Islington Market Bill*[13]. The prerogative, that is the power enjoyed by the Crown at common law, does not extend to a prohibition of trading between subjects. Such a prohibition would be bad: *Case of Proclamations*[14].

As to the principle relied upon by the appellant established by

1 (1862) 1 H. & C. 51.
2 (1809) 2 Taunt. 120.
3 (1839) 5 M. & W. 375.
4 (1883) 25 Ch.D. at 541.
5 [1928] I.R. 103.
6 (1879) 42 L.T.N.S. 16.
7 (1882) 22 Ch.D. 287.
8 (1883) 25 Ch.D. 511.
9 [1904] 1 Ch. 212.
10 [1874] W.N. 4.
11 [1934] 2 K.B. 299.
12 [1905] 2 I.R. 147.
13 (1835) 3 Cl. & F. 513.
14 (1611) 12 Co.Rep. 74.

Attorney-General v. Horner[1] and other cases to support an interpretation favourable to the preservation of market rights, the legislation here is unequivocal and is incapable of any interpretation other than that of prohibiting sale to the public and of fixing the price. The market rights of the appellant are not extinguished, but must be exercised subject to the change in circumstances. The market owner can not compel any vendor of commodities to resort to the market. Market services can no longer be usefully or lawfully rendered in respect of those commodities either by the market owner *or by any other person.*

Harrison Q.C., *Gibson Q.C.* and *McIvor* for the Ulster Transport Authority. There is absolutely no evidence of any kind, direct or inferential, that the Northern Ireland Road Transport Board was ever brought into the counsels of the Ministry and the Society. On the contrary the evidence shows that the flat rate, which the appellants say was an essential part of the alleged conspiracy, was in fact introduced in connection with the old roll and ham trade before the present marketing scheme started. It has been suggested that the Road Transport Board and its successor played a part in the conspiracy by providing cheap transport, but in fact the Ministry's charge to the producer had nothing to do with the Board or the Authority. There is no evidence of a conspiracy by the Transport Board to commit a tort either by levying a rival market or by intercepting pigs on their way to market. It cannot be correct to say that any concerted action which happens to produce a detriment to a market is a disturbance, and an act which is not tortious in itself does not become tortious by repetition. It has been suggested that *McCutcheon v. Carney*[2] is authority for the proposition that systematic buying outside the market can amount to an infringement. If that case has the effect contended for, it is submitted that it should not be followed as it was a case heard on assizes in which the judgment was not reserved and no argument was addressed on the point. The decision was based on whether or not certain franchise rights existed.

Patton Q.C. in reply. Disturbance must always be a question of fact. It is only necessary to prove fraud in circumstances where the sale complained of is so small in dimensions that no jury could find that advantage had been taken of the market. Here we are not claiming in respect of a single sale but in respect of large scale buying over a period which has resulted in the market in a particular commodity ceasing altogether. There has been an interception of pigs which

[1] (1884) 14 Q.B.D. 245. [2] [1938] Ir. Jur. Rep. 73.

would otherwise have come to the market carried out by (i) ringing the market with agents to receive telephone calls, (ii) offering a better price for live pigs than for dead pigs, (iii) offering cheap transport, and (iv) intimating quite clearly that no one authorised to buy pigs will be found in the market.

Inviting sellers to come and sell at a place other than the market cannot be anything other than an invasion of the market owner's franchise—of his exclusive right—and there can be no question but that the effect of the acts complained of has been detrimental.

It is not correct to say that there is no element of a rival market. A rival market need not be technically a market: *Goldsmid v. Great Eastern Railway Company*[1]. It consists in setting up a rival place of sale in such a way as to deprive the owners of the benefit of their franchise: *London Corporation v. Low*[2]. It may seem that the decision in *London Corporation v. Lyons*[3] contradicts the dicta in those cases but on a careful examination it does not. The question there was whether the respondent was carrying on such a type of rival market that he was not entitled to rely on the defence that there was no room in the market.

In the present case there may not have been, at the Society's premises, a concourse of buyers in the ordinary market sense but the fact was that all the persons who could buy were present and all persons wishing to sell were invited. There could not have been any other sort of concourse in the circumstances. It is an obvious fallacy to imply that if only one buyer turns up on a market day that therefore there is no market.

It is not correct to say that there is no evidence that the Transport Board were involved in a conspiracy. There was the meeting to discuss the project; the agreement to give a special transport rate; the agreement as to a relay station for messages, and the agreement to carry pigs to Enniskillen to a place other than the market with full knowledge that a sale was involved and that there was a market in existence in Enniskillen. That is quite sufficient prima facie evidence to put the onus on the Authority.

Cur. adv. vult.

[1] (1883) 25 Ch.D. 511.
[2] (1879) 42 L.T.N.S. 16.
[3] [1936] Ch. 78.

LORD MACDERMOTT L.C.J.: In this action the plaintiffs claim that they are entitled to certain market rights in the town of Enniskillen and that they have been disturbed in such rights by the defendants. In addition to other relief, they seek damages against the defendants for this alleged disturbance and for conspiring to disturb the plaintiffs in their said rights.

In order to expose and explain the material issues I must commence with a brief reference to the nature of the plaintiffs' market rights, to the commodities the subject matter of their claim and to the character of the alleged disturbance. That done, it will be convenient to give some consideration to the question of what in law constitutes an actionable disturbance of market rights, and then to enquire how far, if at all, the plaintiffs are entitled to relief in respect of the acts of which they complain.

The plaintiffs' title to hold markets and fairs in Enniskillen is not in dispute. In the statement of facts it is agreed that by conveyance dated June 17, 1947, they "became possessed of the exclusive right in "fee simple by Letters Patent dated respectively the 28th day of May "in the 10th year of the reign of King James I and the 20th day of "February in the 53rd year of the reign of King George III....to "hold markets and fairs in or at Enniskillen in the County of Fer- "managh and to exercise all the rights set forth in the said Letters "Patent," and, further, that they "have at all times material to this "action held 12 fairs in every year and a market each Tuesday and "Thursday in every week in exercise of the rights conferred by the "said Letters Patent and of rights exercised by the plaintiffs and their "predecessors in title from time immemorial or conferred by Letters "Patent which have been lost or destroyed by accident."

The grant of James I to William Cole, his heirs and assigns, conferred the right to "hold one free mart in or at the said town of Enniskillen "....every Thursday weekly yearly....for ever and one fair or mart "in or at the aforesaid town....on every first day of August com- "monly called Lammas Day."

The grant gave the right to levy tolls and to hold a court of pie powder. It appointed the grantee, his heirs and assigns, clerk of the markets within the town and then proceeded, according to the plaintiffs, to fortify the rights conferred in a passage which I shall refer to hereafter as "the prohibition" and which ran as follows: "....and "further we will and by the presents firmly enjoin and command that "no person or persons sell or expose for sale or cause to be exposed

"for sale by retail or in parcels any commodities whatsoever by way "of merchandise within the space of three miles in a straight line on "every side of the town of Enniskillen aforesaid everywhere to be "measured unless such person or persons shall be planted or placed "by the aforesaid William Cole his heirs and assigns in or within the "said town of Enniskillen aforesaid or there sojourning residing or "living under pain of forfeiture of all and singular such merchandise "and commodities so against the tenor and intention of these our "letters patent sold or exposed for sale."

The grant of George III was made to John Willoughby Earl of Enniskillen, his heirs and assigns. It conferred the right to hold "nine additional yearly fairs" in or at the town of Enniskillen on the tenth day of January, February, April, June, July, September, October, November and December, with power to levy tolls and hold a court of pie powder.

It will be observed that these grants provide for but one weekly market—the Thursday market—and for but ten of the twelve yearly fairs. The Tuesday market and the two extra fairs are not held under these grants but, as we have seen, the right to hold them has been admitted on the basis of prescription or a lost grant. That right must therefore be taken as subject to the common law respecting franchises of this sort, and the same may be said of the right derived from the grants, at any rate if one leaves the prohibition out of account. I shall have to return later to that provision and its effect. Until then I shall proceed on the assumption that in their nature and extent the plaintiffs' market rights are regulated by the common law.

The grants contain no restriction on what may be dealt with and treated as tollable in the plaintiffs' markets and fairs. The present suit is concerned with only two marketable commodities, namely, bacon pigs sold dead and bacon pigs sold alive for slaughter. Before 1934 the sale in Enniskillen of live bacon pigs for slaughter was unknown and the bacon pig market in Enniskillen was confined entirely to dead pigs. This situation led Mr. Nicholson for the defendants, other than the Ulster Transport Authority, to submit that the plaintiffs' market rights did not extend to live pigs for slaughter. The learned judge rejected this submission in a passage in his judgement which reads as follows: "In these circumstances Mr. Nicholson contends that the "franchise does not apply to live pigs for slaughter. In my opinion, "this contention is not well founded. Where the franchise does not "impose any restrictions as to what commodities may be sold in the

"market, I see no reason for presuming that any such restriction is "imposed by the fact that fashions, or the method of trading, have "changed, and that pigs for bacon are now sold alive instead of dead." I agree with this view in so far as it relates to the franchise derived from the market grant. I know of no authority for the proposition that a general franchise by grant operates only in respect of such commodities as were marketable when the grant was made, and if the live pigs with which this action is concerned had actually been bought in the plaintiffs' Thursday market I can see no ground on which a claim for tolls could have been resisted. But can the view of the learned judge also be applied—as I have no doubt was intended—to the plaintiffs' Tuesday market which was held, not under the grant, but under a title based on prescription or a lost grant? The practical importance of that question may not be very great for the acts complained of in connection with live pigs for slaughter would probably have had very much the same effect on the plaintiffs' market rights irrespective of whether those rights related to Thursdays alone or to Thursdays and Tuesdays as well. But however that may be, I am of opinion that the conclusion of the learned judge was right with regard to the Tuesday as well as the Thursday market. Doubtless as a matter of convenience, the commodities marketed on each of these days were not all of the same kind, but there is nothing in the evidence to indicate a difference in the market owners' rights, as respects the range of marketable commodities, between one day and the other, and I think the fair view of the excerpts from the agreed statement of facts which I have quoted above is to that effect.

To appreciate the nature of the alleged acts of disturbance and the main issues raised thereby it is necessary to say something of the facts and circumstances which led up to the situation of which the plaintiffs now complain. I must refer in more detail to certain aspects of that situation later, but for the moment an outline will suffice. As already mentioned, the bacon pig market in Enniskillen was confined entirely to dead pigs before 1934. In that year the Pigs Marketing Board which had been established under the Agricultural Marketing Act (Northern Ireland), 1933, set up collecting centres to which producers brought live pigs of bacon weights which they had for sale. The Board had a monopoly of the purchase of such pigs and one of their functions was to sell the pigs they collected and bought to the curers. One of the more obvious advantages of this new system was that it gave producers who conformed with the Board's requirements as to weight and quality a more stable market. Those who could take advantage of it had no longer to choose between accepting a poor price and

taking their dead pigs home again. The Board, however, did only a small volume of business in County Fermanagh and the Tuesday market at Enniskillen for dead pigs was little affected by their operations. Then, after the outbreak of war the defendant Ministry undertook and exercised on behalf of the Ministry of Food certain powers and duties vested in the latter Ministry by the Defence Regulations and, subsequently, by the Supplies and Services (Transitional Powers) Act, 1945. On January 15, 1940, the defendant Ministry took over the Pigs Marketing Board's organisation and became the sole purchaser in Northern Ireland of live pigs for slaughter. By the Pigs (Sales) (Northern Ireland) Order, 1940, (S. R. & O. 1940, No. 39) which came into force as from that date it was enacted that:— "Except under and in accordance with the terms and conditions of a "licence granted by or under the authority of the Ministry of Agri- "culture for Northern Ireland, no person shall sell or offer to sell or "buy or offer to buy any pig for slaughter or any carcase of a pig pro- "vided that the foregoing restriction shall not apply to any pig or the "carcase of any pig sold to that Ministry or to any person authorised "to buy pigs or the carcases of pigs on its behalf."

And by a further order which it will be convenient to mention now—the Livestock (Restriction on Slaughtering) (Northern Ireland) Order, 1947, (S. R. & O. 1947, No. 1080)—it was, inter alia, provided, in effect, that no person should slaughter a pig for human consumption except for sale to a licensed bacon curer.

The Ministry's succession to the Board as sole purchaser of live pigs for slaughter produced no immediate change of consequence in the dead pig market in Enniskillen. Curers from all parts of Northern Ireland continued to attend it and, with the sanction of the Ministry, to purchase such carcases as they required until July 19, 1948.

The first named defendants (hereinafter called the Society) have been at all material times licensed bacon curers and the owners and occupiers of a bacon curing factory in the town of Enniskillen. About 1920 the Society started purchasing dead pigs on farms instead of in the Enniskillen market. These were taken to the market and weighed there and a payment was made to the market owners in respect of them. The considerable distance between the Society's premises and the market place made this an inconvenient procedure and later an arrangement was arrived at between the Society and the market owners whereby the carcases bought on the farms were taken direct to the Society's premises and a payment was made to the market

owners at the rate of 6d. per pig. The Society continued to operate this arrangement in respect of their dead pig intake until July 19, 1948. In 1946 the Society commenced collecting live pigs at the producers' farms. These were slaughtered at the market place on terms agreed with the market owners. Prior to July 1948, the position in the Enniskillen district was, therefore, broadly as follows. The change-over from buying dead to buying alive, which was a consequence of the new methods of marketing envisaged by the Act of 1933, had started but had got no great distance. The carcase market at Enniskillen remained substantial and, in addition, the Society were buying carcases direct from producers as described. The purchasing of live pigs for slaughter was still relatively small and, apart from the purchases by the Society which I have mentioned, was in the hands of the Ministry. So far, no dispute as to the market owners' rights had arisen. The Ministry, following the practice of the Pigs Marketing Board, paid the market owners 2d. per head in lieu of any claim for tolls on such pigs as it purchased and dispatched alive from Enniskillen, while the Society had made their own arrangements with the owners, as already stated, in respect of purchases outside the market. In all this there was, so far as I can see, no attempt to settle or determine what the strict rights of the market owners were in regard to sales outside the market. Naturally enough, those concerned preferred to avoid that knotty problem by the working arrangements to which I have referred.

With the war over, it is clear that both the Society and the Ministry were anxious to see the further development of bacon pig production in Fermanagh. Their interests and motives were, of course, different, but the opportunity for a joint enterprise presented itself and led to the next relevant step which is described in the statement of facts thus:— "In or about the years 1945 or 1946 the Society approached "the Ministry with a view to getting the necessary permissions and "licenses to build and operate an abattoir of their own. The Ministry "urged the Society to embark on a much larger programme to include "enlarged storage space with refrigeration and modern machinery "for carcase cleaning and other processes. In consideration of their "doing so the Ministry undertook to use the Society's premises as the "principal collecting centre for County Fermanagh and to employ "the Society as the Ministry's Agents for the allocation and dis-"tribution of chilled carcases to other curers in Northern Ireland." At the end of this paragraph there is the following sentence: "At no "time were the owners of the market consulted or informed of what "was going forward." This indicates that the owners were kept out-

side the negotiations. But it is perhaps well to add, particularly in view of the allegations of conspiracy made against the defendants, that I do not think it means or could have been intended to mean that the Society and the Ministry were attempting to steal a march on the owners or to keep them in ignorance of the general nature of their plans. The correspondence and documents referred to in the statement of facts make it clear (a) that in 1946 the then owners had an understanding of what was on foot, (b) that, at the beginning of 1947, agreement in respect of the owners' toll claims had virtually been reached with the Ministry on the basis that the Society would provide a market for all pigs in the Enniskillen area, (c) that at this stage the plaintiffs became owners of the market rights by purchase, and (d) that the question of such rights was formally broached to the plaintiffs in a letter dated April 12, 1948, from the Ministry. No agreement, however, eventuated, and the whole matter has now to be determined according to the legal rights and obligations of the interested parties.

The outcome of the negotiations between the Society and the Ministry was that the necessary alterations and extensions were made at the Society's premises and the Ministry then transferred its live pig collecting centre there. The new project, as I shall call it, came into operation on July 19, 1948, following an advertisement in the local press inserted by the Society with the knowledge and approval of the Ministry. This advertisement announced the opening of the Society's new abattoir and that the Ministry's live pig receiving depot would be established there and would provide for the acceptance of live pigs from producers in County Fermanagh and part of County Tyrone. Then came a statement to the effect that live pigs would be conveyed from the farm to the abattoir by the Northern Ireland Road Transport Board at an "all-in" charge of 8d. per pig, but that producers who wished to deliver their own live pigs to the abattoir would not have to pay this charge. The advertisement next gave the basis on which live pigs would be paid for by the Ministry, and after that it informed producers that what they had to do, if they wanted the transport service offered for pigs ready for slaughter, was to give notice by postcard or telephone, not later than the Friday morning prior to the week of the required uplift, to the Society's office or the Transport Board's office or to one of three named agents who included the defendants Messrs. Noble and Thompson. The advertisement then ended by announcing that the Society "are still prepared "to accept farm killed pigs, delivered at producer's expense to their

"premises. These will be paid for at current official prices for dead "pigs."

One of the attractions of the new project as thus advertised was undoubtedly the cheap transport facilities it made available. These had been worked out following consultations between the Transport Board and the Ministry and an agreement between them whereby, instead of charging the Ministry according to the published scale of rates, the Board agreed to charge the Ministry at a flat rate per pig, irrespective of distance, which would be calculated to yield the same aggregate sum as if the traffic had been carried at the published rates. This flat rate was 2/6d. per pig to start with, and it is therefore clear that the transport charge which the Ministry deducted from the payment due to producers was heavily subsidised.

Since the new project began to function on July 19, 1948, neither the Ministry nor the Society nor any other curer or person authorised to purchase pigs or pig carcases has attended the plaintiffs' market. The result of this has been twofold: no sale of live pigs for slaughter has been possible in the market for there have been no competent buyers, and the sale of dead pigs has stopped for the same reason. Since July 19, 1948, the Society and the Ministry have ceased to pay the market owners any sum for or in lieu of tolls and the plaintiffs' claim for tolls in respect of pigs passing through the Society's premises has been met by the plea that no such tolls are payable. There cannot be any doubt that the effect of the new project, as it has been operated, has been to make most producers in the area sell their bacon pigs alive, instead of dead, and to withdraw the bacon pig trade from the plaintiffs' market. As Curran J. observed in a passage in his judgment which has not been challenged by any party "....it is clear that the "plaintiffs' market rights in pig carcases have been rendered valueless, "and the plaintiffs have been unable to participate in the marketing "of live pigs for slaughter, and it is equally clear that these con- "sequences are the direct result of the scheme introduced by the "Ministry of Agriculture and carried out with the co-operation of the "Society and the Northern Ireland Road Transport Board and its "successor, the Ulster Transport Authority."

It is the activities carried on upon or in relation to the Society's premises, under what I have called the new project, that the plaintiffs now challenge as a disturbance of their market rights. The working of this project has been modified in certain respects since its inception, but I need not enumerate these changes at this juncture except to note (a) that when the plaintiffs issued their writ on December 19, 1949,

the Northern Ireland Road Transport Board had been succeeded by the defendant the Ulster Transport Authority, (b) that collecting agents were dispensed with as from October 31, 1950, the producers desiring transport facilities being thereafter required to notify the Ministry directly on a form provided for the purpose, and (c) that the Ministry's power to purchase pigs alive or dead ceased on July 3, 1954, and the Society has since continued to operate upon similar lines in conjunction with the present Pigs Marketing Board and the Ulster Transport Authority. Nor need I now enter upon the details of the procedure followed in the operation of the new project. It may, however, serve to clarify the issues if, at this point, I summarise in general terms what happened upon the Society's premises after the new project got going.

The pigs delivered at the premises fall into three categories—(1) live pigs purchased by the Ministry and delivered at the premises by the advertised transport facilities; (2) live pigs purchased by the Ministry and delivered at the premises by the producers. This category accounts for approximately twenty per cent. of the live pigs purchased by the Ministry and delivered at the premises; and (3) dead pigs sold by producers to the Society. The numbers of these are relatively small. The Society buy from the producers under licence and the bringing of the carcases to their premises is independent of any scheme or arrangement made by or with the Ministry.

The Society use in their curing business all the pigs they buy dead and most of the live pigs that come to the premises. Until June 1952, when the Society changed over from the roll and ham to the Wiltshire cure, they killed their requirement of live pigs on behalf of the Ministry and subsequently purchased the carcases from it. After June 1952, the Society purchased the live pigs and slaughtered them on their own account. Any live pigs which were surplus to the requirements of the Society were removed from Enniskillen by the Ministry and were sold elsewhere and did not become the property of the Society. At no material time have the Society's premises been open to the public except, as the statement of facts says, "....to the extent "that the Society and the Ministry were at all material times ready "and willing to receive thereat in accordance with the arrangements "above stated live pigs and pig carcases which members of the public "wished to sell."

Before proceeding to any closer examination of the acts complained of by the plaintiffs, it will be well to see what general guidance the law

has to give on the nature of actionable disturbance, and to consider the true construction and effect of the prohibition contained in the grant of James I.

What amounts to the disturbance of a market is not an easy question to answer in the abstract. It is, of course, the infringement of the market owners' rights under their franchise and there, as Lindley L.J. observes in *Goldsmid v. Great Eastern Railway Co.*[1], "we come "to the difficulty of finding out exactly what a market is." The same learned judge then proceeds to describe what I may call the central feature of a market franchise and to state the effect of the cases as to whether certain types of conduct will constitute a disturbance. The material parts of this passage are as follows: "But without giving any "definition of a market the authorities shew that the grantee of a "market has some exclusive rights, and those exclusive rights, without "attempting to define them positively and negatively, include an ex- "clusive right of inviting the public to come and buy and sell in the "place where the franchise has authorised the market to be held. ".... Now, have those rights been disturbed? The first question we "have to consider is this: Can a man disturb a franchise who does not "himself pretend to have got one? In other words, who does not "usurp those exclusive rights which are conferred upon the grantee of "a market? This question is decided in the affirmative. There is plenty "of authority to shew that a man may disturb a market without pre- "tending to have got a market himself in the sense of having got a "franchise..... Having got so far, we next have to consider what kind "of acts will disturb this franchise. It is not necessary, as I have said "(the authorities are conclusive upon that), that the Defendants shall "claim to have a rival exclusive right of market. But we come to other "difficulties which are considerable. On the one hand, speaking gener- "ally and apart from any special circumstances, a man does not dis- "turb a market simply by having a shop near it, and selling in that "shop goods which are similar in their nature to those sold in the "market. That seems well settled. On the other hand, I apprehend it is "also settled by the cases to which I have alluded, and especially by "those cases of the *Corporation of Manchester v. Peverley*[2], *Mosley v. "Chadwick*[3], and *Mosley v. Walker*[4], that any one does disturb a "market who keeps a place sufficiently near to it to affect it, and who "invites the public to come and sell and buy there. What the Defend- "ants are doing here appears to me to be a plain disturbance of the "Plaintiffs' market. I do not rely upon the fact that they advertise the

1 (1883) 25 Ch.D. 511, 548.
2 (1876) 22 Ch.D. 294, n.
3 (1782) 7 B. & C. 47, n.
4 (1827) 7 B. & C. 40.

"place as a market. Market is an ambiguous expression, and nothing "turns upon what they call it. The question is what they do..... "It is inviting all the public within reach of their railway to send their "goods to these arches by rail for sale, and for sale through the "instrumentality of tenants of the arches—middle men who are "salesmen—and they are also inviting the public to come and buy. "That is really what they are doing; and the evidence, I think, shews "conclusively that if that does go on, the result will be that it will "ruin the Plaintiffs' market."

In *Downshire v. O'Brien*[1] Chatterton V.C. said: "A market is, "properly speaking, the franchise right of having a concourse of "buyers and sellers to dispose of commodities in respect of which the "franchise is given." That differs a little from the language used by Lindley L.J. but both descriptions are apt to convey the nature of what I have called the central feature of such a franchise. To this it must be added that the exclusiveness of a market franchise confers a local rather than a general monopoly inasmuch as, at common law, the right to be protected from disturbance, which goes with the franchise, only applies to what is done within a limited distance of the place where the market is or may be held. This radius of protection, or common law distance as it is sometimes called, is just short of seven miles and is usually taken as being in strictness six and two-third miles.

Within the protected area, then, it follows that what will constitute a disturbance must in some way infringe the market owners' franchise rights. That is self-evident, but in my opinion it justifies two conclusions which are relevant to the present case. In the first place it means that acts which damage or adversely affect the owner's enjoyment of his franchise will not necessarily amount to a disturbance. Mr. Patton, for the plaintiffs, contended that once their franchise had been admitted, the unchallenged finding of Curran J. as to the detrimental effect of the acts complained of on the market made an end of the case, because it was nothing less than a finding that the defendants had committed the tort of disturbance. I think that proposition goes much too far and I reject it because, in my view, a franchise such as that in question confers no right to have the fortunes of the market maintained at a constant level or kept immune from the consequences of changing social and economic conditions. So far as I am aware this point is not discussed at any length in any of the

[1] (1887) 19 L.R. Ir. 380, 390.

market cases, but it was considered in relation to a ferry franchise by the Court of Appeal in England in *Hopkins v. Great Northern Railway Co.*[1]. There the owners of an ancient and exclusive ferry over the River Nene lost traffic and eventually gave the ferry up because the defendant railway erected a railway bridge and a footbridge about half a mile above the ferry. The court held against a claim for compensation under the Lands and Railway Clauses Acts and one of the reasons for the decision was that, apart from statute, an action for disturbance of the ferry could not have been maintained. On that aspect of the case Mellish L.J., delivering the judgment of the court, said[2]: "We will first consider that which is by far the most important, "whether an action could have been maintained in respect of the "diversion of traffic caused by the railway bridge. Now, in order that "such an action may be maintained, it is clearly not sufficient for the "owner of the ferry to prove that something has been done by which "traffic has been diverted from his ferry. He must prove that his right "has been violated. He is the owner of a particular description of "monopoly, which the law allows to be created from its being presumed "to be for the public advantage, and to maintain an action he must "prove that the defendants have in substance done that which he has "the sole right to do." And later[3]: "The first grantee of the ferry is "supposed to have represented to the Crown that it would be for the "public advantage that a ferry should be established in the particular "locality, and then, in consideration of the grantee undertaking "perpetually to keep up the ferry, the Crown has granted to him the "exclusive right of ferrying within certain limits. There is nothing in "the nature of this transaction which would lead me to believe "that the Crown intended to guarantee, or had power to guarantee, "the grantee of the ferry against changes of circumstances and future "discoveries of an entirely different description of transit by which "ferrying might be superseded. The Crown professes to protect the "grantee against the competition of other persons who are in the "same line of business and do the same thing that he does; but he "appears to run the risk of any change of circumstances, which may "render ferrying at that place useless."

I do not forget that analogies have to be used with caution in the field of ancient franchises, but it seems to me that the decision I have just cited recognises a principle which is also applicable to market rights. There, as in the case of a ferry, the grant is made to serve the needs of a particular locality, and there, no less than in the case of a

[1] (1877) 2 Q.B.D. 224.
[2] Ibid. 230.
[3] Ibid. 231.

ferry, it would be irrational to impute to the Crown an intention which would prevent or stifle future developments or new methods in the marketing of goods. I am therefore of opinion that Curran J. was right when he refused to hold that the plaintiffs' proof of loss was enough to establish their claim without more. They had also to show an invasion of their rights.

The second of the conclusions I have mentioned is closely related to the first. The existence of a general market franchise for a particular locality does not mean that there can be no legitimate buying or selling of marketable commodities within that locality but outside the market. The essence of the right is the monopoly of holding a market for a particular locality at a particular place. As a corollary, there must be some restriction on marketing activities elsewhere in the area served, but I do not think it has ever been suggested that the market owner has the right to have all marketable goods brought to his market place for sale. The boundaries of actionable disturbance may, indeed, be difficult to trace, but I cannot find that the common law has ever got the length of including within them the private sale on private premises or of giving the franchise owner any right of toll in respect of such a sale. If a farmer who is within the common law distance of a franchise market wants to sell a cow to his neighbour, or his eggs to the dealer who calls at the door for them, I know of no reason why he should not lawfully do so. There is nothing de minimis about this. The position seems to be simply this: the franchise gives the market owner no right to have that sort of sale or that sort of purchase brought to his market place. His rights are centred on the market place and on the facilities made available there for those who want to use them.

I am not to be taken as suggesting that infringement starts as soon as one gets away from the private sale on private premises. How far one has to travel from there to get to actionable disturbance will necessarily depend on the relevant facts and circumstances of each case and no general test can be laid down. But that there may be some distance to go seems a reasonable inference from the view which the law takes of sales in shops. Such sales are certainly not private in the sense in which I have used the word, for the ordinary shopkeeper invites the public to his premises. Yet, as Lindley L.J. said in *Goldsmid's* case[1], it seems well settled that a man does not disturb a market simply by selling, in his shop near it, goods of a similar

[1] (1883) 25 Ch.D. 511.

nature to those sold in the market. That rule, no doubt, is to be taken as applying to ordinary shops and the ordinary course of business. As Jessel M.R. said in *Mayor of Manchester v. Lyons*[1]: "It has been "held more than once in modern times, whatever may have been the "case in former days, that as an ordinary rule the sale of a man's own "goods in the regular and ordinary course of business in his own shop "is not a disturbance of a market, and that something more must be "shown to make it a disturbance."

That more guarded way of putting the matter is justified, for shop and shopkeeping are elastic terms and I do not think there is warrant for the view that the establishment of some special kind of shop, such as a mammoth emporium in the vicinity of a market, could never be a disturbance. It is also to be observed that by immemorial custom or prescription the franchise owner may acquire the right to prevent sales on market days in shops in the market town, though such a right will not lie in grant: see *Mayor of Penryn v. Best*,[2] and *Mayor of Macclesfield v. Chapman*[3]. But this exception only points the general rule and serves to emphasise that the reason why the ordinary shop sale and, a fortiori, the ordinary private sale on private premises are not acts of disturbance lies in the fact that the grantee of a market franchise has no right to prevent such sales or to insist that they should be conducted in his market.

Though acts of disturbance resist precise definition they can be classified in a convenient if not very exact way. Leaving out of account, as irrelevant in the present case, acts of physical obstruction and acts founded on a claim of market rights, most allegations of infringement, including those made here, fall into one or other of two groups. These follow the distinction drawn by Cotton L.J. in *Goldsmid's* case[4], and may be described thus:— (1) acts which work what the older cases call a fraud on the market, and (2) acts which amount to what is known as levying or setting up a rival market. There is no very clear-cut dividing line between these categories and it is probably right to say that the difference between them is a matter of degree rather than principle: but there is a practical distinction and, in general, it would seem that acts within (1) are usually more circumscribed or transitory in their nature, more dependent upon the holding of the proper market, and less of a challenge to the exclusive character of the franchise than acts within (2). Thus, taking advantage of the market in a manner calculated to avoid tolls, as by selling outside the market so as to gain the custom of those resorting to it, will ordinarily

[1] (1882) 22 Ch.D. 287, 307.
[2] (1878) 3 Ex.D. 292.
[3] (1843) 12 M. & W. 18, 20.
[4] (1883) 25 Ch.D. at 540.

be a disturbance within the first of these groups. In the cases illustrating this sort of disturbance the wrongdoers are mostly sellers. But in Ireland buyers have also been held liable. In *Wynne v. Martin*[1], Bushe, C.J. was clearly of opinion not only that an action lay for preventing people coming to market, but also for buying goods which are on their way to market—an activity very much akin to the former offence of forestalling. Then, a century later in *Loughrey v. Doherty*[2], we have the Supreme Court in Eire (Kennedy C.J. and Murnaghan J., Fitzgibbon J. dissenting) following *Wynne v. Martin*[1], and holding that the practice whereby certain purchasers of marketable commodities intercepted farmers coming into a market town and bought their produce before it reached the plaintiff's market was an actionable disturbance, and this although the plaintiff's grant conferred no right to levy tolls. I suppose it is to be expected that most of the 'fraud on the market' decisions should concern sellers rather than buyers, but in principle there seems no reason why buying should be excluded from what is actionable: if selling outside the market-place to those going there to buy may be taking advantage of the market, the same can surely be said of buying outside the market-place from those on their way to sell in it. In each case an opportunity is created *by the holding of the market* which is turned to account to the detriment of the market owner. Nor can it be said that what constitutes a disturbance in this category—be the disturber buyer or seller—impinges on the view I have expressed as to private sales on private premises. Such sales owe nothing to the franchise. They are not brought about or facilitated by the market and the concourse of buyers and sellers it attracts.

As we have seen, a market to be a rival market need not be carried on under a claim of right, and it is plain that it need not reproduce all the features or characteristics of a franchise market, though the more it does so, the easier it will be to show that an actionable disturbance has occurred. In *Goldsmid's* case[3] Cotton L.J. spoke of a "rival place "of sale," while Lindley L.J. said[4] that anyone disturbs a market "who keeps a place sufficiently near to it to affect it, and who invites "the public to come and sell and buy there." And in *Mayor of Dorchester v. Ensor*[5], Channell B. said ".... what is complained of "is, not that the defendants sell their own goods, but that they provide "a means for others to sell their goods without bringing them to the

1 (1826) Batty 110.
2 [1928] I.R. 103, 114.
3 (1883) 25 Ch.D. 511, 541.
4 Ibid. 549.
5 (1869) L.R.4 Ex. 335, 342.

"market." Then, in *Corporation of London v. Lyons*[1], we find Maugham L.J. (as he then was) saying this: "It seems to me that in order to "establish the fact that a rival market is being levied it is necessary to "show that the defendant is providing facilities for a concourse of "buyers and sellers of goods ordinarily dealt with in the plaintiff's "market, so that there is a prima facie fraud upon the market owner "(to use an old phrase), in other words, so that there is a probability "of his being deprived of tolls, stallages or other profits or emolu-"ments appertaining to the market. To put it in another way, there "must be an element of rivalry in the case."

These descriptions of what will be actionable as a rival market lead to no concise definition, and I think the authorities are against the view that this form of infringement must follow a fixed pattern. Mr. Nicholson submitted that a rival market involved the provision of a concourse for buyers *and* sellers. If, as I understand it, this submission means that a rival market has to provide for a plurality of both buyers and sellers, my view is that, properly regarded, the decisions do not go that length. No doubt, some of the dicta on the subject are phrased in a manner which gives apparent support to Mr. Nicholson's argument, and no doubt the fact that a concourse for both buyers and sellers has been provided is an important element in deciding whether or not a rival market has been brought into existence. But I do not think any of the judges who spoke of a concourse of buyers and sellers meant, or needed to decide, that provision had always to be made for a plurality of buyers and sellers before the rival marketing could amount to a disturbance. It would lead to strange results if such were the case. It would mean that where the demand for some marketable commodity had, either by force of law or a process of successful trading, become vested in one person, that person could compete with the franchise at his pleasure by holding a sellers' market. Had the Society provided for a concourse of buyers and sellers at their premises for the buying and selling of pig carcases that would clearly have been a rival market. But assume, instead, that the Society, as sole licensees for the purchase of carcases in the district, organised a purchasing service upon their premises, providing thereby a concourse of sellers but with only themselves as buyers. Why should not this also be a rival market and actionable? It would bring the sellers into contact with the only purchaser and the damage to the franchise would not be any the less merely because all the buying had to be done by one buyer.

1 [1936] Ch. 78, 141.

In the present case this point was connected with the contention that the effect of the making of S.R. & O. No. 39 of 1940 was to determine or suspend—I quote from the defences "....the rights of "the plaintiffs (if any) to insist upon the sale of live pigs or pig "carcases within their alleged market or to demand or receive tolls or "other payments in respect of any such sale....."

Now it is, I think, abundantly plain that the fact that this Order gave the Ministry and its licensees a purchasing monoply was not the sole cause of the departure from the plaintiffs' market of the bacon pig trade. Had other factors not been present the carcase trade might have stayed in the market—as it did for years after 1940—and the live pig trade might have gone there as well. There is nothing in the Order or its necessary consequences that I can discern to prevent that having happened. And if it had happened, what answer would there have been to a claim for tolls, apart from the defences based, not on the Order, but on Crown immunity which the Ministry has now abandoned? If, as I would hold, the Order was compatible with a continuance of the plaintiffs' previous rights it seems to me more than difficult to say that its intention or necessary effect was to take those rights away. Nor can I think that this conclusion should be modified by reason of the fact that bacon pig prices had become fixed under statutory authority. A system of fixed prices instead of the former higgling may tell against traditional marketing and so cause the market owners a loss of revenue; but I see no ground for saying it deprives them of their rights, such as they may be.

I come next to the prohibition contained in the grant of James I. With the exception of those "planted or placed" by the grantee "in or within" the town of Enniskillen "or there sojourning, residing "or living" no person is to "sell or expose for sale....any com- "modities whatsoever by way of merchandise within the space of "three miles in a straight line on every side of the town of Ennis- "killen." The area of this prohibition is therefore bigger than that of the exception, but much smaller than that determined by the common law distance.

I confess I find this provision hard to understand and difficult to construe. I have had an opportunity of reading the judgment about to be delivered by Black L.J. and I think his opinion that this prohibition does not relate at all to the market franchise may well be right. But this view was not canvassed before us, and I shall proceed on the assumption that the prohibition was intended to buttress or

reinforce the market franchise. So assuming, there seem to be three possible constructions. The first is to take the prohibition as referring only to the sort of selling that would constitute a rival market or other common law disturbance. But that would be tantamount to a reduction of the common law distance. There is, however, nothing in the grant or in the known circumstances to show a reason for such a reduction and, without deciding whether it would be competent so to provide, I think this interpretation should be rejected. The second possibility is to read the prohibition literally and as relating to all sales, including shop sales and what I have termed private sales on private premises. But that would be to go beyond the protection of the common law and to forbid much which could not fairly be regarded as marketing business. In *In re Islington Market Bill*[1] the judges are reported as having advised the House of Lords that a prohibition in the grant of a market other than would be attached by the common law was void. Though the report is not clear at all points, this opinion appears fairly plainly and should, I think, be taken as good law: see Halsbury, 2nd ed., vol. 14, p. 49, para. 70, which is founded upon it. This consideration seems to me to justify the rejection of this literal construction of the prohibition. The grant proceeds to declare a forfeiture of all goods sold or exposed for sale in contravention of the prohibition and the third possibility is that the intention was to forbid only such sales as would constitute a disturbance at common law and, without altering the common law distance, to provide an added sanction for acts of disturbance taking place within the three mile zone. That seems to me the preferable, or perhaps I should say the least objectionable, construction on the assumption I am making. But, if so, it gives the plaintiffs no rights beyond those which they have at common law for such a forfeiture even if lawful, which I very much doubt, could not benefit them. And so, whether the prohibition relates to the market franchise or not, I am of opinion that it does not help the plaintiffs and that the whole question of disturbance falls to be dealt with according to the position at common law.

I must now turn back to the acts complained of, and it will be convenient, in doing so, to deal separately with the three categories of pigs delivered at the Society's premises which I have already described.

(1) *Live pigs purchased by the Ministry and delivered at the Society's premises by the advertised transport facilities.*

[1] (1835) 3 Cl. & F. 513, 515.

The first question here is what should be regarded for present purposes as the place of sale of the pigs in this category, and in my opinion the test of that lies in where the contract of sale was made and not in where the property passed. The contracting parties may suit their mutual convenience by arranging where the property is to pass—see section 17 of the Sale of Goods Act, 1893,—but in markets and marketing the important moment is when a binding bargain is made, and the selling or buying that is relevant to disturbance must, I think, be selling or buying in that sense. In *Newtownards U.D.C. v. Tweedie*[1], it was held by a Divisional Court (Palles L.C.B., Madden and Kenny JJ.) that the prohibition against selling within the prescribed limits which is enacted by section 13 of the Markets and Fairs Clauses Acts, 1847, was not breached by a person who lived outside the limits delivering eggs within them pursuant to an antecedent contract of sale. In the course of his judgment in that case Palles L.C.B. said: "We are bound, however, by the long course of Irish "decisions, and I think it is decided in all these cases that when goods "are brought within the limits of the town in pursuance of a previous "contract of sale and for the purpose of delivery that delivery within "the town does not amount to an offence, although that delivery. "according to the contract, not only completes the contract, but is the "determining moment when the property in the goods passes." That, of course, was a decision on the statute, but I think it supports the view that the protection of a market must be related to the contract of sale rather than to acts or stipulations affecting its completion by delivery or otherwise at some subsequent time and, it may be, at some different place.

In the present case there are no findings on the question under discussion and we must form our own conclusions on the material available. This is mainly documentary and some of it is more voluminous than enlightening, but I find no difficulty in holding that the pigs in this category were, from the inception of what I have called the new project, bought on the producers' farms. In its salient features the course of dealing is quite clear at all material times. The producer having pigs of bacon weight for sale so informed the Ministry, either directly or through an agent, and requested transport. That was the offer. The Ulster Transport Authority, or, at the beginning, the Northern Ireland Road Transport Board, then called at the producer's farm and uplifted the pigs. That was the acceptance.

[1] (1907) 41 I.L.T.R. 23.

There can be no doubt that in this the Board and the Authority acted on behalf of the Ministry and that the contract of carriage was made with the Ministry. When the pigs were collected from the producer the transport employee gave him a receipt for the pigs on a form of way bill. This document was not apt for the purpose. The receipt part was intended for completion by a consignee as a delivery receipt, and the rest of it was obviously designed for use in cases where the contract of carriage was made by the consignor. The form was later changed to accord with the true situation and it is beyond dispute that in fact the producer did not contract with either the Board or the Authority. Not only were the producers under no obligation to pay the costs of transport but, as is agreed in the statement of facts, they did not require and were not concerned to know to which collecting centre their pigs were to be taken. The matter, however, does not rest there. The statement of facts describes the terms and conditions governing the various types of sale to which the case relates. From this it appears that the relevant conditions were first issued by the Ministry of Food and then, in and after 1951, by the defendant Ministry. I need not go through the various editions of these conditions which I shall refer to collectively as "the sale conditions." The material provision in those framed by the defendant Ministry laid down, for the category with which I am now dealing, that the Ministry would "accept for "purchase live pigs" and the property in such pigs would pass to the Minister "immediately after delivery to the carriers." This provision echoed a corresponding provision in the later editions of the Ministry of Food's conditions. The earlier editions of these, including that current when the new project was started were couched in a somewhat different form, but the statement of facts attaches no significance to this and seems to treat the relevant conditions of the Ministry of Food and of the defendant Ministry as having the same effect in this connection. I think this view was well-founded and that the contracts for sale of pigs in this category have, from the beginning, been rightly accepted on all sides as made on the producers' premises. As respects the passing of the property, I incline to the view that this has occurred throughout when the pigs were delivered to the carriers. The sale conditions bear this out. While it was in use, the receipt on the form of way bill if regarded in isolation, might suggest another conclusion, but for my own part I would not be prepared to find that this document made any difference in this respect. I need not, however, elaborate on that. As I have said, the criterion is not where the property passed but where the contract for sale was made, and that was on the farms.

The next question is whether such purchases constituted a disturbance of the plaintiffs' market. As already indicated I am unable to see any ground for thinking that the farmer who sells his own pigs on his own premises is doing anything wrongful or contrary to the plaintiffs' franchise rights. And if that is so I think it must follow that the person to whom he sells is equally innocent of any act of disturbance. This seems to be an example of a private sale on private premises and the circumstances that there are many similar sales taking place and that the purchaser is a public authority acting under statutory powers do not seem to me to alter the nature of the individual transaction or to endow such transactions in the aggregate with any additional quality which would make them a disturbance. In my opinion the market owners have never had the right to prevent a farmer from selling privately on his farm, and if that is so the fact that such selling becomes popular and tends to empty the market will not give them that right.

If, then, as I would hold, the Ministry's purchasing of the pigs in this category does not create a rival market or cause some other form of disturbance, does its subsequent dealing with these pigs make any material difference in the position? The process of collecting the live pigs that have been purchased from the producers and bringing them to the collecting centre on the Society's premises cannot work an infringement of the plaintiffs' rights. But what of the selling done by the Ministry once the pigs have got there? Most of the live pigs bought by the Ministry are sold by it to the Society for their curing business. According to the agreed statement of facts pigs surplus to this requirement "are removed by rail by the Ministry for sale elsewhere" and "The depot officer who is a Ministry Official is directed by the Ministry to send them to Maysfield, Belfast." There is no suggestion that this surplus is disposed of in the market area and it may be left out of account. That leaves for consideration the sales to the Society. These sales seem to take place on the Society's premises and I shall so assume. In my view they are no more a disturbance of the plaintiffs' market than are the sales by producers which I have already considered. They are, no less than those, private sales on private premises. They do not in any way take advantage of the market and to regard them as a rival market would be to break entirely new ground. They follow from the business arrangement made between the Ministry and the Society and are an activity of the new project which, no doubt, plays its part in denuding the plaintiffs'

market; but to hold them a disturbance on that score would be to confuse damnum and injuria.

For these reasons I conclude that, as respects the transactions relating to the pigs in this category, there has been no infringement of the plaintiffs' rights. This means that, as against the Society, the Ministry and the Minister, the plaintiffs' disturbance claims fail in so far as they concern such pigs; and it also means that, as against the Ulster Transport Authority and Messrs. Noble and Thompson, they fail in their entirety as these defendants were only alleged to have disturbed the plaintiffs' rights because of what they had done to provide or arrange for the conveyance of these pigs to the collecting centre.

(2) *Live pigs purchased by the Ministry and delivered at the Society's premises by the producers.*

From the sale conditions and the statement of facts it is clear that the delivery of these pigs was accepted by the Ministry at the Society's premises and after the pigs had been earmarked there, and further that that was when the property passed from the producer. But did the contract of sale take place there too? The procedure followed is stated in the statement of facts. Producers wishing to transport their own pigs to the collecting centre are required to notify the Ministry of the number of pigs which they wish to sell. The Ministry then gives instructions as to the collecting centre to which, and the time when, such pigs should be delivered by the producers. On delivery at the collecting centre the producer is given a receipt for the pigs of which the Ministry has taken delivery. It is called a "Purchase Docket" and the person giving the receipt is described as "Purchasing Officer." In my opinion the contract for the sale of these pigs is made when they are so delivered at the Society's premises and not before. I do not think the Ministry's instructions to the producer as to time and place of delivery constitute the acceptance of an antecedent offer. These instructions seem to me to be only an intimation as to what the producer is to do if he wants his pigs purchased. This is borne out by the sale conditions, which in all editions commence by pointing out that acceptance for purchase by the Ministry is dependent upon due notice being given "twelve days prior to the week in which the pigs "are to be offered for sale." It would appear that if a producer brings his pigs to the collecting centre as and when directed by the Ministry he may expect them to be purchased, but the impression I gather from the documents and the statement of facts is that he is not contractu-

ally bound to deliver at the collecting centre on receipt of the Ministry's instructions.

I proceed then on the basis that the contract of sale in respect of the pigs in this category takes place on the Society's premises. That, in my opinion, produces a situation radically different from that which exists when pigs are purchased by the Ministry on the producers' farms. There, as I have held, what happens is a private sale on private premises. As respects the category now under consideration, the producers resort to the Society's premises to sell their pigs there, and they do so in response to a scheme which has been duly publicised by the Ministry in order to procure that result. I think it would be quite wrong and unrealistic to regard transactions induced by this invitation as private sales on private premises. It is true that the Society's premises, as indicated in the statement of facts, are not open to the general public, but the same paragraph qualifies this in a passage to which I have already drawn attention and which finds that the Society and the Ministry were ready and willing to receive at the Society's premises live pigs and pig carcases which members of the public wished to sell. It is, I think, right to say that the result has been to make these premises a concourse of sellers though not a concourse of buyers; but for the reasons I have mentioned earlier I am of opinion that the one-sided nature of the concourse facilities does not prevent what has been done in this connection constituting a rival market. It may well be that this aspect of the new project—perhaps, indeed, the whole scheme—is a sensible way of doing things and of advancing the public interest. That, however, is not the test. If the Ministry, or any other body in a position to acquire the whole of some marketable commodity produced in the market area, publicly invites producers of that product to sell to it at premises in the market town, it seems to me impossible to say that the rights of the market owners have not been challenged. I am therefore of opinion that as respects this category of pigs the Ministry, the Minister and the Society have, in association, caused a disturbance of the franchise.

(3) *Dead pigs sold by producers to the Society.*

These pigs are all taken by the producers direct to the Society's premises and it is clear that they are bought by the Society there. There is nothing in the material before us to fix any earlier time for the contract of sale. The concluding paragraph of the advertisement which I have quoted above gave public notice of the Society's readi-

ness to do business on these lines. In my opinion the conclusions reached regarding category (2) also apply to the pigs in this category. I hold, accordingly, that the Society have set up what amounts to a rival market as respects dead pigs brought to their premises. The infringement here seems, if anything, clearer than that relating to the live pigs purchased by the Ministry which form category (2). Pig carcases were not only marketable commodities but the plaintiffs' market had been dealing with them in substantial quantities for a long period previous to July 19, 1948, when the new project was put into operation. Thereafter the Society invited those who had previously resorted to the market to come and sell their dead pigs to them at their premises in the market town. Again, it may be that this all marks a step forward to improved marketing conditions, but, again, that is not the test. The loss involved may not be large because the whole trend is to sell bacon pigs alive and not dead, but that there has been an infringement of the plaintiffs' rights I have not the least doubt. It is, in my opinion, a disturbance for which the Society alone are answerable. No doubt, the Ministry knew of the invitation contained in the advertisement and of what was being done, but, as is agreed in the statement of facts, the bringing of the carcases by producers to the premises was independent of any scheme or arrangement made with the Ministry.

As I read the judgment of Curran J. he was not prepared to put the purchasing of live and dead pigs at the Society's premises on the same footing. He was of opinion that the operation of the scheme did not constitute a wrongful disturbance of the plaintiffs' market so far as live pigs were concerned, but as respects the purchasing of dead pigs he seems to have held in favour of the Society on a different ground. As already noted, the Society had been purchasing dead pigs at its premises before the new project had been put into operation, and had been doing this pursuant to an arrangement made with the market owners. The learned judge seems to have taken the view that in those circumstances the plaintiffs could not succeed against the Society in a claim for disturbance and that their rights, if any, lay in contract. With respect, I cannot share that view. The point is not taken in the Society's defence and, apart from that, it is clear that the Society turned their back on the arrangement they had made when the new project came into operation on July 19, 1948. That being the case, I can see no reason why, if the plaintiffs' rights have been infringed by the Society, the Society should not be held responsible in tort.

Lastly, I come to that part of the plaintiffs' case which is founded on conspiracy. This is pleaded in paragraph 6 of the statement of

claim, the defendants charged with conspiring being Messrs. Noble and Thompson, the Minister and the Ministry of Agriculture, and the object of the conspiracy being stated in these words—"....to "organise, promote, encourage, manage and levy a rival and unlawful "market at the said premises of the Society in Enniskillen aforesaid "and thereby to disturb the plaintiffs in the exercise and enjoyment "of their said exclusive right."

Of the defendants named, it follows from what I have already held that, on any view of it, this cause of action must fail against Messrs. Noble and Thompson. The evidence involves them in no unlawful act or combination. As regards the others, there is, if I am right in the conclusions expressed above, evidence that they have committed or become parties to certain wrongful acts of disturbance. But does the evidence factually support the plea of conspiracy as it has been framed? The allegation, it will be observed, is not that these defendants conspired to do a lawful thing by unlawful means. It is that these defendants conspired to do an unlawful thing, namely, to disturb the plaintiffs' market. In my opinion the evidence does not bear out this allegation at all. It seems to me to show (a) that what these defendants combined for was to promote the development of the bacon pig industry in County Fermanagh, and (b) that their wrongful acts were done in the course of accomplishing their lawful and agreed purpose. Whether that comes within the scope of actionable conspiracy so as to make those liable as tortfeasors liable again, in respect of the same loss and damage, as conspirators, does not seem to me an easy question on the present state of the authorities. It is, however, a question which, I am glad to think, does not call for investigation on this appeal. The conspiracy charged has not been proved and, apart from that, the conclusions already reached seem to make the point academic as they give the plaintiffs all the redress to which they would have been entitled had they succeeded in establishing an actionable conspiracy.

In the result, and for the reasons stated, I am of opinion that the appeal succeeds to a limited extent. As regards the defendants the Ulster Transport Authority and Messrs. Noble and Thompson it fails entirely and should be dismissed. The claim for damages for conspiracy also fails against all defendants and so do all claims relating to live pigs purchased on the producers' premises. As respects the other categories of pigs I think the plaintiffs are entitled (a) as against the Society, to a declaration that their market rights have been

disturbed by the user of the Society's premises as a marketing place for dead pigs brought there for sale by producers, and to an enquiry as to the damages caused by such disturbance; and (b) as against the Society, the Ministry and the Minister, to a similar declaration and enquiry concerning live pigs brought to the Society's premises by producers. The Ministry and the Minister have ceased to have any part in the activities described since July 1954, and an injunction should not be granted against them, but I see no reason why, if the plaintiffs still desire it, they should not have an injunction against the Society limited to restraining them from purchasing pig carcases at their premises unless with the permission of the plaintiffs.

The Ulster Transport Authority must have their costs of the appeal in addition to their costs in the court below as already ordered. If the defendants Messrs. Noble and Thompson have properly incurred any costs over and above those incurred by their co-defendants the plaintiffs must pay such costs here and in the court below. As against the other defendants, the plaintiffs have failed in part and succeeded in part and I think the proper order would be that these defendants bear their own costs in both courts and pay the plaintiffs one half of their costs, also in both courts.

BLACK L.J.: It is conceded in the statement of facts agreed between the parties in this case that the plaintiffs are entitled under letters patent of 10 James I and 53 George III to the right to hold markets and fairs in Enniskillen and that at all times material to this action they have held a market every Tuesday and Thursday in exercise of the rights conferred by the said letters patent and of rights exercised by themselves and their predecessors in title to which they have become entitled by prescription. The central question in issue in the case is whether the methods of dealing adopted in recent times by the defendants The Scottish Co-operative Wholesale Society Limited and the Ministry of Agriculture infringe the plaintiffs' market rights.

The dispute between the parties has arisen out of the introduction under government auspices of more highly organized and presumably improved systems of pig marketing in Northern Ireland. Though the possession by great landowners of market franchises with their responsibilities as well as their benefits may have seemed quite normal at the time of the Plantation of Ulster and may have accorded with the social and economic conditions then obtaining, it has become evident during the present case that such franchises may ill suit the vastly different conditions of the present century and may indeed

prove a clog upon up-to-date methods of marketing. Over seventy years ago in *Great Eastern Railway Co. v. Goldsmid*[1], Lord Fitzgerald took occasion to observe: "I am rather inclined to think that these "franchises, such as market franchises, however wise and suitable "they may have been three centuries ago, are unsuited to modern "times and modern exigencies."

It may be desirable, as has been mooted, that Parliament should make provision for the buying out of such market rights or for their compulsory acquisition by some public authority. But such market franchises are a well recognised type of property, and unless and until Parliament intervenes their owners are entitled to the protection of their franchises against unlawful disturbance. As Lord Fitzgerald continues after the passage which I have just quoted from his speech in *Goldsmid's* case[2]: "But we are not here to make laws—we are not "here to legislate—we are here to administer the existing laws. We "are not here to interfere with or to confiscate private right—our "province is to protect it." But while careful to protect existing market rights the courts in my opinion ought to be equally careful to avoid the risk of widening or extending such rights.

In view of the Lord Chief Justice's very full examination of the law and of the facts of the case I feel that there is much that I need not repeat in this judgment. At the outset, however, I should like to deal with a passage in the letters patent of 10 James I which was much canvassed at the Bar in view of the difficulty of determining its precise bearing upon the market rights granted by the patent. The passage to which I refer reads: "And further we will and by the presents firmly "enjoin and command that no person or persons sell or expose for "sale or cause to be exposed for sale by retail or in parcels any com- "modities whatsoever by way of merchandise within the space of "three miles in a straight line on every side of the town of Enniskillen "aforesaid everywhere to be measured unless such person or persons "shall be planted or placed by the aforesaid William Cole his heirs "and assigns in or within the said town of Enniskillen aforesaid or "there sojourning residing or living under pain of forfeiture of all and "singular such merchandise and commodities so against the tenor "and intention of these our letters patent sold or exposed for sale."

If this provision is to be read as one relating to the grant of the market franchise by the letters patent I agree that it would give rise to very considerable difficulties, and I also agree that if the letters patent

[1] (1884) 9 App. Cas. 927, 964. [2] Ibid.

were solely concerned with the grant of a franchise of holding markets that these difficulties would certainly arise and would have to be faced. But in my view the provision in question is not to be regarded as relating to the market franchise granted by the letters patent. We have had only before us what purports to be portions of the letters patent which granted the market rights to William Cole. Although no evidence was tendered as to the other contents of the letters patent, and although reference to histories of the period would presumably not be admissible for the purpose of ascertaining private rights, I think that having regard to the fact that the grant was made at the time of the Plantation of Ulster it is a fair inference that the probabilities are that it formed part of a grant to William Cole of land at Enniskillen and the district with a view to the establishment there of English or Scottish settlers. If this is so then the provision which I have quoted would be merely a provision designed as an inducement for persons to settle in the town of Enniskillen by purporting to confer upon them an exclusive right of selling any merchandise within three miles of the town. Such I am disposed to think is the true nature of the provision. I think it is merely an attempted grant of a monopoly to settlers and residents in the town and that it is quite a separate provision from the grant of the market rights to William Cole, and, so far at any rate as the present case is concerned, has no real bearing upon those rights. In any event it would appear that the purported grant of a monopoly to settlers and residents in Enniskillen of the right to sell within three miles of the town was void inasmuch as every subject of the Crown has a common law right to carry on any trade in any place within the realm unless there is a local custom to the contrary: *Clark v. Le Cren*[1]. It is well known that notwithstanding the decision in *Darcy v. Allen*[2], and even after the passing of the Statute of Monopolies, the early Stuart sovereigns continued to grant monopolies which were legally invalid. In *Simpson v. Attorney-General*[3], Lord Macnaghten did not hesitate to pronounce a charter of Charles I absolutely void not only by the Statute of Monopolies but also at common law. Moreover, the attempt in the letters patent to impose the penalty of forfeiture for any infringement of the monopoly would also be void. The sovereign cannot by letters patent create a forfeiture of, or by his own act confiscate, a subject's property: *Nightingale v. Bridges*[4].

I come now to the various types of transaction which are challenged as constituting an invasion of the plaintiffs' market rights. It will be

1 (1829) 9 B. & C. 52.
2 (1602) Moore (K.B.) 671.
3 [1904] A.C. 476, 486.
4 (1689) 1 Show. (K.B.) 135.

convenient to follow the Lord Chief Justice's classification of these transactions. With regard to pigs collected at pig producers' premises, I agree that on the evidence available to us the contract of sale must be regarded as made when the pigs were uplifted from the producer's premises by the Transport Authority (or previously by the Transport Board). I do not think that it can be said that there was any concluded contract by which seller and buyer were bound until the pigs were delivered to the Authority or the Board, and I also think it clear that once the pigs had been delivered to the carrier both parties were bound, and indeed that from that time the property in the pigs had passed to the buyer. I cannot see how transactions of this kind can be regarded as disturbances of the plaintiffs' market rights. If one goes back to the time before the first introduction of government controlled systems of marketing pigs, there was then nothing to compel pig producers in Fermanagh to market their pigs in Enniskillen. They were at full liberty to sell them wherever they liked and to whatever purchasers offered the most advantageous prices. If in those days a curer in Belfast or Londonderry had instituted an arrangement by which his lorry would tour a district of Fermanagh and purchase pigs from the producers in that area at their own premises I am not aware of any authority which would suggest that this could be held to be an infringement of the Enniskillen market owner's rights, unless of course the purchaser went so far as to intercept pigs which were actually on their way into the Enniskillen market or in some other manner took advantage of the existence of that market. If this is so, there can be no difference simply by reason of the Ministry or the Pigs Marketing Board having become the sole purchasers of pigs, and accordingly I agree that the collection of pigs from producer's premises, the system being that the contract of sale was concluded by the delivery of the goods to the carrier at the producer's premises, did not constitute an infringement of the plaintiffs' market rights.

As regards pigs delivered at the Scottish Co-operative Wholesale Society's premises in Enniskillen, the case appears to me to stand on an entirely different footing. The advertisement published in the press on July 15, 1948, at the instance of the Society and the Ministry, was a notification to all and sundry the pig producers in County Fermanagh that both live pigs and farm killed pigs would be accepted for purchase at the Society's premises in Enniskillen. Live pigs delivered there were purchased by the Ministry and pig carcases were purchased by the Society. In both cases it is clear that the sale took place in Enniskillen

and that the pigs, the subject matter of the sale, were physically in Enniskillen at the time when they were sold. In my opinion the introduction of this system of the purchase of pigs at the Society's premises from all such producers as cared to bring their pigs into Enniskillen for sale really amounted to what is called in the authorities a rival market. The advertisement was obviously calculated to attract numerous sellers to the Society's premises and although a market usually connotes a concourse of both buyers and sellers I think there can be little doubt but that a rival market amounting to a disturbance of a franchise market could be constituted by a scheme involving either a concourse of buyers or a concourse of sellers. In *Goldsmid v. Great Eastern Railway Co.*[1], Lindley L.J. described the rights of the owner of a franchise market in these terms: "The authorities shew "that the grantee of a market has some exclusive rights, and those "exclusive rights, without attempting to define them positively and "negatively, include an exclusive right of inviting the public to come "and buy and sell in the place where the franchise has authorized the "market to be held." It seems obvious that a market owner's rights could often be effectively interfered with by a single vendor setting up a place for sale in the market town and inviting the public to come and buy marketable commodities there instead of in the market. In *Elwes v. Payne*[2] Jessel M.R. was clearly of opinion that a rival market which constituted an interference with the market owner's rights could be held to have been established although there was only a single seller. And this view commended itself also to the English Court of Appeal in *Wilcox v. Steel*[3]. I do not see why on principle the same view should not equally obtain in a case where there was a single purchaser who invited a wide section of the public to come and sell at his premises. And indeed Murnaghan J. acted on this view in a case where there was a single purchaser in *McCutcheon v. Carney*[4]. In that case he is reported as saying: "Now if on a Friday within the limits of "the market, that is, within the town and in reasonable proximity to "the market, persons bring in potatoes and the defendant systematic- "ally buys them in his own place of business and not in the market, "he does infringe the plaintiffs' rights and disturbs the market." In my view one of the effects of the scheme introduced by the Ministry and the Society in 1948 clearly was to establish a market for the purchase of pigs both dead and alive at the Society's premises in Enniskillen. This seems to me to be a definite infringement of the plaintiffs' market rights.

[1] (1883) 25 Ch.D. 511, 548.
[2] (1879) 12 Ch.D. 468, 473.
[3] [1904] 1 Ch. 212.
[4] [1938] Ir. Jur. Rep. 73, 76.

With regard to the sales by the Ministry to the Society, I confess I have felt more difficulty than in regard to the other aspects of the case. It is stated in the agreed statement of facts that while the Society was a roll and ham curer the pigs were slaughtered by the Society on behalf of the Ministry and the Society subsequently purchased the carcases, but that since the Society has turned over to Wiltshire curing in the month of June 1952, the pigs become the property of the Society before slaughter. It was contended by the plaintiffs that inasmuch as the pigs or pig carcases were in Enniskillen at the time when the Ministry sold them to the Society these sales infringed the plaintiffs' market rights. This would seem at first sight quite a plausible contention. On reflection, however, I cannot accept it as sound. I cannot find that sales of this type—what the Lord Chief Justice has described as private sales on private premises—have ever been held to constitute a disturbance of a franchise market. To hold that such sales were actionable as constituting a disturbance would extend the authorities well beyond the extent to which they have gone up till now. I observed earlier in this judgment that, while careful to protect existing market rights, we ought to be equally careful to avoid widening or extending them. In towns or large cities where ancient markets exist thousands of private sales must take place between wholesalers and warehousemen analogous to the sales in the present case from the Ministry to the Society, and I have never seen it suggested that such sales might amount to a disturbance of the markets. Accordingly I am not prepared to hold that the sales from the Ministry to the Society constitute an infringement of the plaintiffs' rights.

In the result I find myself in full agreement with the conclusions of the Lord Chief Justice and I agree with the form of the order which he has proposed.

I have not overlooked the contention pleaded by the Ministry and the Society in their defences that as a consequence of S.R. & O. 1940, No. 39, made under the Defence of the Realm Regulations, 1939, the plaintiffs' market rights in respect of pigs had ceased and determined or alternatively were for the time being of no effect. No such intention to affect the proprietary rights of market owners appears on the face of the Order. The courts in construing statutes and statutory orders are always jealous of preserving the proprietary rights of the subject and will not impute an intention on the part of the Legislature to take away or abridge such rights without compensation unless such an intention is clearly manifest. When the objects of a statute or a

statutory order do not obviously imply such an intention it is presumed that the Legislature does not desire to confiscate the property or encroach on the rights of persons and it is accordingly expected that if such be the Legislature's intention it will manifest it plainly, if not in express words, at least by clear implication and beyond reasonable doubt: (See Maxwell on Interpretation of Statutes, 9th ed., p. 290, and the cases there cited). The existence of the system of control of the sale and purchase of pigs introduced by S.R. & O. 1940, No. 39, was quite consistent with the continued observance of market rights such as those to which the plaintiffs are admitted to have been entitled and nowhere does the Order purport to abrogate or suspend such rights. In my opinion, therefore, the Order does not afford the Ministry or the Society a defence to the plaintiffs' claim that their market rights have been interfered with without legal justification.

As regards the claim against the Ulster Transport Authority, Thomas M. Noble and William Robert Thompson for alleged conspiracy, I content myself by simply saying that on the evidence I cannot see how the allegation of conspiracy against these defendants can possibly be sustained.

SHEIL J.: I am so completely in agreement with almost the entirety of the judgments just delivered that it is with diffidence and indeed reluctance that I have, in one respect, to express dissent from my Lords' opinions. I will limit my observations having regard to the full and careful review of the law just stated by my Lords.

It is unnecessary to introduce the matter further than by stating that my difficulty arises in respect of sales by the defendant Ministry to the defendant Society. Whether the Society bought from the Ministry carcases which had been previously slaughtered by the Society, as was the case prior to June 1952, or bought live pigs from the Ministry as has been done since that date, it is beyond dispute that such purchases were made in Enniskillen. On a first consideration those transactions would appear to me to be an infringement of the plaintiffs' market rights. Black L.J. thought at first sight that the plaintiffs' contention in this respect was a plausible contention. I have further considered this aspect of the case in the light of the judgment of the Lord Chief Justice and with the knowledge that the Lord Justice, on reflection, has rejected the contention of the plaintiffs on the point. The elaborate judgments just delivered have not made it easier for me to dissent from the opinions of my Lords but after long consideration I am compelled to differ from them and so to express myself.

I cannot think that these particular dealings were simply private sales on private premises. There was an elaborate and powerful organisation on both sides the object of which was, if not to direct, at least to encourage producers to avail themselves of the facilities offered. I have not lost sight of the fact that producers had a choice of methods of marketing. Those methods have been dealt with and disposed of by my Lords. But as I see it the policy of the Ministry and the Society was—not to use a stronger word—to foster the method now under discussion. I cannot, with great respect, see that as an ordinary private transaction. The defendants, by public advertisement, encouraged producers to cause pigs or carcases to be sent to the Society's premises. At those premises the Ministry sold, not one, nor twenty, but many pigs and carcases. These things do not convey to my mind a private transaction.

It may be that my view is unduly coloured by what I am now to say but I cannot omit to refer to the correspondence. In my opinion it should be considered, and if considered, it demonstrates two propositions; that the Ministry and the Society felt that the market owners were not rendering any services, and secondly that the tolls were for that reason irksome. It was not the fault of the owners that the services were not rendered. It suited the Ministry and the Society much better that there should not be the trouble of transporting pigs to the market, having them tolled and then re-transported to the Society's premises. In that state of affairs it was arranged that there should be no journeys to the market but that the owners should get some form of compromise payment.

As I have said, the Ministry and the Society felt that these payments were an irksome burden and in reply to the letter dated July 23, 1948, from the plaintiffs the Ministry replied by letter of July 29, 1948, that "the Ministry is advised that in the circumstances in which "it is now purchasing pigs for slaughter no toll is payable to your "company." Apart from the fact that the issue involved is not one of purchase by the Ministry but of sale by the Ministry this letter strikes me as a somewhat cavalier method of disposing of the plaintiffs' claims. I would refer also to the letter dated October 7, 1948, from the Chief Crown Solicitor to the plaintiffs' solicitor. In this context I have, perhaps, put the last first and I shall now go back to 1946 when the letters clearly show an unwillingness to give something for nothing as it were. It may be that I attach undue importance to these documents but they were relied on by counsel at the trial and the learned trial

judge had regard to them in his judgment. The net result has been as stated in the statement of facts and as found by the learned trial judge and not questioned that the plaintiffs' market rights in respect of pigs and carcases have been rendered valueless.

I can well understand the attitude of the Ministry and the Society but the correspondence proves to me that they hoped to avoid payments to the plaintiffs and, if that be a proper conclusion, I find no difficulty in respect of the sales by the Ministry to the Society at the latter's premises in Enniskillen in holding that they devised a method of depriving the plaintiffs of their tolls in respect of these sales and that they have succeeded in so doing, and that their actions constitute an infringement of the plaintiffs' market rights. I am far from suggesting that those rights should be extended and therein I agree entirely with Black L.J's. dictum. I have sympathy with the Ministry in their efforts to help the farming community in Northern Ireland and indeed I admire them, but that sympathy cannot dispose me to find other than I have done when I find that the Ministry and the Society have acted as I have already stated.

In this respect, therefore, and only in this respect I differ from the judgments delivered by my Lords.

Appeal allowed in part.

Solicitor for the appellants: *E. C. Ferguson.*

Solicitors for the Society: *Falls & Hanna.*

Solicitors for the Ulster Transport Authority: *J. Dunville Coates & Co.*

Solicitor for the other defendants: *Chief Crown Solicitor.*

S.M.M.

REGINA (GLASGOW) v. COUNTY COURT JUDGE OF TYRONE

REGINA (MURNAGHAN) v. COUNTY COURT JUDGE OF TYRONE[1]

Jury—Exemption from service as a juror—Ineligibility—Whether specific statutory exemption inconsistent with subsequent general legislation—County surveyors and assistants—Grand Jury (Ireland) Act, 1836 (6 & 7 *Wm.* 4. *c.* 116) *s.* 44.

County surveyors and their staffs and assistants are ineligible for service as jurors by virtue of section 44 of the Grand Jury (Ireland) Act, 1836, and their names should not be inserted in the jurors' lists notwithstanding that they are not persons specifically exempted or disqualified by the Juries (Ireland) Acts from serving on juries.

MOTION to make absolute conditional orders that writs of certiorari should issue directed to the County Court Judge of Tyrone, to remove into the Queen's Bench Division for the purpose of being quashed, the adjudications of the county court judge at the court held by him in Omagh, in the County of Tyrone, in October, 1957, for the revision of the general lists of jurors by which adjudications he held that the names of the county surveyor and six assistant surveyors for County Tyrone should not be expunged from the several lists. On the request of the solicitor appearing for the prosecutors, being the county surveyor and one assistant surveyor, the county court judge recorded in writing that he had refused to expunge the names on the ground that they were not persons who were exempted from serving on juries.

The conditional orders for certiorari were obtained on the ground that the adjudications of the county court judge were made without and in excess of jurisdiction and were contrary to section 44 of the Grand Jury (Ireland) Act, 1836[2]. The Clerk of the Crown and Peace filed an affidavit showing cause why the conditional orders should not be made absolute.

Conaghan Q.C., *McGonigal Q.C.* and *Murnaghan* for the prosecutors. The county court judge appears to have taken the view that section 44 of the Grand Jury (Ireland) Act, 1836, had been repealed by the Juries Act (Ireland), 1871. Section 4 of that Act

[1] In the Queen's Bench Division (Crown Side) before Sheil J. and McVeigh J.: Jan. 31, Feb. 7, 14, 1958.

[2] Grand Jury (Ireland) Act, 1836, s. 44:
"Be it enacted that no such Surveyor, his Clerk or Assistant shall be eligible or "liable to serve or act on any jury...."

provided for the repeal of all inconsistent acts and section 5 provided that "every man....shall be qualified and liable (save as hereinafter "exempted or disqualified) to serve on all juries...." A general repeal section in a statute, such as section 4 of the 1871 Act, goes no further than the general legal principle applying to interpretation of statutes: *Garnett v. Bradley*[1]. An Act which is general in its scope must not be interpreted as taking away particular rights: *R. v. Pugh*[2].

Special enactments are not to be construed as being impliedly repealed by general Acts unless there is some express reference to the earlier legislation or unless there is a necessary inconsistency between the two Acts. General affirmative words do not have the effect of repealing prior enactments unless the statutes cannot stand together: *Kutner v. Phillips*[3], *Thorpe v. Adams*[4], *Dobbs v. Grand Junction Waterworks Company*[5], *Grand Trunk Railway Co. of Canada v. Robertson*[6]. There is no inconsistency in county and assistant surveyors having a special exemption or being considered ineligible. The word "eligible" does not appear in any of the acts relating to jurors. The word "hereinafter" in section 5 of the 1871 Act is not sufficient in itself to show an intention to repeal all special exemptions. It is submitted that the words in brackets in section 5 were inserted merely for the purpose of drawing attention to later portions of the Act such as section 6 which provided that "the persons described in the Second "Schedule hereto annexed shall be absolutely freed and exempted "from being returned and from serving on any jury...." Surveyors were not specifically exempted by the schedule but would have come under the category of local government officers. There is nothing inconsistent in two exemptions standing side by side.

Section 44 was treated as being in force, or alternatively, was re-enacted, when it was adapted by the Adaptation of Irish Enactments Order, 1899, made under section 105 of the Local Government (Ireland) Act, 1898, and it appears as so adapted in the Revised Statutes.

Surveyors were by no means the only persons to have an immunity under special Acts and the various special exemptions have been treated in subsequent particular legislation as subsisting notwithstanding the later passing of the Juries Acts in Ireland and England. Soldiers, officer of excise, commissioners of inland revenue, medical practitioners, dentists and officers of the post office were and are exempted by particular enactments.

1 (1878) 3 App. Cas. 944, 965.
2 (1779) 1 Doug. 188.
3 [1891] 2 Q.B. 267, 271.
4 (1871) L.R. 6 C.P. 125.
5 [1882] 9 Q.B.D. 151.
6 [1909] A.C. 325.

Nicholson Q.C. and *McConnell* for the respondent. The question whether or not section 44 of the 1836 Act has been repealed depends upon whether the Juries Act (Ireland), 1871, and the subsequent Juries Acts form an exclusive code in the sense that they contain all possible exemptions and disqualifications, save in so far as they have been amended by later Acts. The whole key to the position lies in the intention of Parliament. It is submitted that when the Legislature passed the 1871 Act the intention was to wipe the slate clean and consolidate the entire law with regard to qualification and exemption. That intention appears from the words "save as hereinafter exempted "or disqualified" in section 5 and from the words "under this Act" in section 12. The Act was clearly intended to be the complete guide to the revising barrister in deciding who should be included in the jurors' lists.

If, however, section 44 of the 1836 Act was not repealed by the 1871 Act then it was caught by section 20 of the Juries Procedure (Ireland) Act, 1876, which repealed the provisions of the Juries (Ireland) Acts relating to exemption. Section 2 of the 1876 Act defined the term "Juries (Ireland) Acts" as meaning the Juries (Ireland) Acts, 1871 to 1872 "and the Acts altering, amending or "affecting the same for the time being in force." If section 44 was not repealed in 1871, then in 1876 it was an act "affecting" the Juries Act (Ireland), 1871.

The Adaptation of Irish Enactments Order, 1899, could not have the effect of re-enacting a provision already repealed. It is to be remembered that section 44 dealt with several other matters besides jury service, and only that part of it which had not been repealed could have been effectively adapted.

The exemption of local government employees provided for by the earlier statutes was swept away in 1926. What ever may have been the position before the passing of the Jury Laws Amendment Act, 1926, it is quite clear that the intention of the draughtsman of the 3rd schedule to that act was to include all exemptions, and this is recognised in the Juries Act, 1953. The schedule to the 1926 Act is quite inconsistent with the continuance of section 44 of the 1836 Act. In *Garnett v. Bradley*[1] all the judges were agreed that where there is a true inconsistency the later act must prevail.

Cur. adv. vult.

[1] (1878) 3 App. Cas. 944.

SHEIL J. delivered the following judgment of the court: The prosecutors in these cases, who are the county surveyor and one of the assistant county surveyors for the County of Tyrone, claim that neither of them, nor any of their staff, can be compelled to serve as jurors. The question of the alleged immunity arises now because the learned county court judge of County Tyrone has declined to expunge their names from the jurors' lists and they seek to have that determination quashed on certiorari.

To ascertain the present position of the prosecutors qua jury service it is necessary to go back to the Grand Jury Act, of 1833, section 42 of which provided that no county surveyor should be eligible or liable to act on any jury.

The Grand Jury Act of 1836 enabled county surveyors to appoint clerks and assistants, and section 44 of the same Act enacted (inter alia) that "no such surveyor, his clerk or assistant shall be eligible or "liable to serve or act on any jury. . . ." This word "eligible" is not to be found in any of the other statutes relating to juries or jurors which have been cited by counsel.

In our opinion the policy and purpose of section 42 was to prevent a situation arising where a county surveyor might find himself in conflict between his duties as a juror and his duties to the Grand Jury —the then local government. This view is supported by the repetition of the disabling words in section 44 of the 1836 Act, which, as we have seen, extended the ineligibility to the clerks and assistants of such surveyors, for if it were impolitic to let surveyors serve on juries, it would be no less so to have members of their staffs serve.

We think this is an important consideration when one comes to consider whether section 44 has been, as is argued for the respondent, impliedly repealed by the Irish Juries Acts, 1871 and 1876, for, at the passing of those Acts, the surveyor was still responsible to the Grand Jury—indeed, from 1862 the Grand Jury had to approve his appointment—and whatever reason existed to prevent him from being a juror in 1833 and 1836 still existed in the 1870s. We do not require further to consider the 1833 Act as it was repealed by the Statute Law Revision Act of 1874.

It is, however, argued for the respondent, that section 4 of the Juries (Ireland) Act, 1871, impliedly repealed section 44 of the Grand Jury Act, 1836, and indeed, but for the background I have mentioned and the considerations later to be examined, a strong argument might have been based on the exceedingly wide terms of section 5 of the 1871 Act beginning "Every man. . . .shall be qualified and liable

"(save as hereinafter exempted or disqualified) to serve on all "juries...." following the repeal section (section 4).

But we are of opinion that the 1871 Act did not repeal the statutes of 1833 or 1836. I have already stated one reason. There are others. In order that there may be an implied repeal there must be a true or real inconsistency between the earlier and the later statutes. If there is, effect must, of course, be given to it and there is a repeal of a former by a later act. But one should not be astute to spell out inconsistency, and I do not find here such a necessary inconsistency that the two statutes cannot stand together. In *Kutner v. Phillips*[1] A. L. Smith J. said: "Unless Acts are so plainly repugnant to each "other, that effect cannot be given to both at the same time, a repeal "will not be implied." That dictum has been since often approved.

Further it seems to us that to the proposition that the 1871 Act had a self-contained jury-code, and that all were liable to serve as jurors except those exempted or disqualified by the Act, answer is to be found in the exempting sections of the statutes cited by Mr. McGonigal, of which the Medical Practitioners Act, 1858, the Customs Act, 1876, the Dentists Act, 1878, and the Post Office Acts are examples. If we are right about the 1871 Act, the statutes of 1876 cannot advance the matter. Section 20 of the Juries Procedure (Ireland) Act, 1876, repeals the provisions of the Juries (Ireland) Acts which relate to the exemption of persons from serving on juries. Section 2 defines the Juries (Ireland) Act as the Juries (Ireland) Acts 1871 and 1872, and the Acts amending or affecting the same. The latter words clearly refer only to legislation subsequent to the defined Acts.

It must also be added that in 1899 section 44 was treated as being in force. Section 105 of the Local Government (Ireland) Act, 1898 authorised the adaptation by Order in Council of certain enactments including the Grand Juries (Ireland) Acts, 1816 to 1895, and in the Adaptation of Enactments Order of 1899 section 44 is recited as one of the enactments taken over, as it were. Furthermore, the relevant part of section 44 appears in the recently published Statutes Revised, affecting Northern Ireland.

It was also argued, though not, we think, strongly, that if section 44 survived the years 1871 and 1876, it received its death blow from the Jury Laws (Amendment) Act (Northern Ireland), 1926. This is not so

[1] [1891] 2 Q.B. 267, 272.

since section 1 of the Northern Ireland Statute, which deals with qualification of jurors, is expressed to have effect in lieu of the Act of 1876.

It seems to us that so far as jurors are concerned, four classes are to be noticed—those who are qualified, those who are disqualified, those who are exempt, and, though the class is small, those who are ineligible.

For these reasons, we are of opinion that the prosecutors' objections are well founded. At an early stage of the hearing Mr. Nicholson queried whether certiorari was the proper remedy in this case. We think there is force in this, and, if necessary, an order for mandamus, as well as, or in lieu of, certiorari, can go. It is very unlikely that this will be necessary.

Order absolute.

Solicitors for the prosecutors: *J. B. & R. H. Twigg.*

Solicitor for the respondent: *Chief Crown Solicitor.*

S.M.M.

REGINA v. TAYLOR[1]

Criminal law—Sentence—Common law misdemeanour—Attempted rape—Lawfulness of sentence in excess of two years imprisonment—Implied repeal by statute—Offences against the Person Act, 1861 (24 & 25 *Vict. c.* 100), *s.* 38.

Though a common law misdemeanour for which no specific punishment is prescribed is punishable at the discretion of the court, the offence of attempted rape and the offence of assault with intent to rape, the latter of which by section 38 of the Offences against the Person Act, 1861, is punishable with not more than two years' imprisonment, are so nearly identical in substance that the Legislature must be taken to have intended the maximum penalty for the latter offence to be applicable also in the case of the former offence, and accordingly a sentence in excess of two years' imprisonment may not lawfully be imposed for the offence of attempted rape.

APPEAL against sentence. The appellant, Roy Taylor, together with another prisoner, was charged at Downpatrick Quarter Sessions in January 1958 with the offence of attempted rape. Both prisoners pleaded guilty and the appellant was sentenced to seven years' imprisonment, while his co-prisoner was sentenced to two years' imprisonment.

Bowman for the appellant. Two points arise for consideration on this appeal, viz. (i) whether the sentence imposed was legally permissible; and (ii) whether it was excessive in the circumstances, especially having regard to the sentence imposed on the appellant's co-prisoner.

The first point would appear to be covered by the case of *R. v. Morris*[2], in which Lord Goddard, who delivered the judgment of the court, held that there was no limitation on the term of imprisonment which could be imposed at common law for a misdemeanour, provided only that the sentence was not inordinate. In *R. v. Higgins*[3] it was held that an attempt was not punishable with a greater sentence than the completed offence, but in this case the completed offence would have been punishable with imprisonment for life.

[LORD MACDERMOTT L.C.J.: Section 38 of the Offences against the Person Act, 1861, provides for a maximum sentence of two years' imprisonment for the offence of assault with intent to commit a felony, and the specimen indictment under that section given in Archbold, 26th ed., p. 962, is an indictment for assault with intent to ravish. That would appear to be substantially the same offence as the one which was the subject of the charge.]

1 In the Court of Criminal Appeal before Lord MacDermott L.C.J., Black and Curran L.JJ.: March 10, April 25, 1958.

2 [1951] 1 K.B. 394. 3 [1952] 1 K.B. 7.

That is so, but the Crown has elected to indict the appellant for the common law offence and not under the statute.

The other point relates to the disparity between the sentences imposed on the two co-prisoners. Although it was a matter for the court in passing sentence to determine whether any discrimination should be made between the two—see *R. v. Ball*[1]—the disparity between the sentences imposed is a matter which can be taken into account in this court: *R. v. Richards*[2]. The prisoner undoubtedly committed a very serious offence but I submit that the sentence imposed is too severe, particularly in relation to that imposed on the other prisoner.

Babington for the Crown. Section 38 of the Offences against the Person Act, 1861, was not intended to deal with cases such as the present. The charge against the appellant was a charge of a common law misdemeanour—one for which no special punishment is prescribed. It was therefore an offence punishable with imprisonment at the discretion of the court: *R. v. Morris*[3]; *R. v. Bryan*[4], per Lord Goddard. Accordingly, I submit that the sentence of seven years' imprisonment was a lawful one.

On the question of disparity the court should look at the sentence imposed in the light of the circumstances, and the fact that another prisoner received a lighter sentence is not a ground for saying that this prisoner received an excessive sentence. Having regard to the facts of the case, the sentence imposed was quite justified.

Cur. adv. vult.

LORD MACDERMOTT L.C.J. (delivering the judgment of the court): The appellant, a young soldier now aged 19½, was charged with attempted rape at Downpatrick Quarter Sessions on January 24, 1958. He pleaded guilty and was sentenced to seven years' imprisonment by the learned County Court Judge of Down. By leave of this court he now appeals on the ground that his sentence was too severe.

The first question for consideration is whether this sentence is a lawful sentence. In England the view seems, for a long time, to have been that the maximum sentence for attempted rape was one of two years' imprisonment, and there can be no doubt that it was the prevalence of that view which led to the passing of the Attempted Rape Act, 1948, by which the maximum sentence was made one of

[1] (1951) 35 Cr. App. R. 164.
[2] (1955) 39 Cr. App. R. 191.
[3] [1951] 1 K.B. 394.
[4] (1951) 35 Cr. App. R. 121.

seven years' penal servitude. That Act, however, did not apply to this country and the Parliament of Northern Ireland has not enacted any corresponding measure. If it had, the sentence now in question would be lawful, as imprisonment has been substituted for penal servitude by section 1 of the Criminal Justice Act (Northern Ireland), 1953.

It was submitted, however, by counsel for the Crown that no legislation was necessary to justify the appellant's sentence. This submission rested on two propositions—(i) that the offence with which the appellant was charged is a common law misdemeanour for the punishment of which there is no specific statutory provision, and (ii) that such a misdemeanour is punishable at the discretion of the court and without any limitation on the length of the sentence that may be imposed.

The first of these propositions is clearly well founded. In this jurisdiction the Legislature has not provided specifically for the punishment of this offence, and the statutory punishment of penal servitude has never applied to it.

The second proposition was founded on several decisions of the Court of Criminal Appeal in England, the most important of which is *R. v. Morris*[1]. There, the accused pleaded guilty to a charge of conspiring fraudulently to evade customs duties and was sentenced to four years' imprisonment. The offence charged was a common law misdemeanour and it was submitted that at common law the maximum punishment for such an offence had become one of two years' imprisonment. The Court of Criminal Appeal rejected this submission and confirmed the sentence. The grounds for this decision are set out in the judgment of the court delivered by Lord Goddard C.J. Dealing with the earlier history of misdemeanours he said[2]: "It is abundantly "clear—it can be seen by anybody who cares to go into the history of "the matter—that the duration of the imprisonment or the amount of "the fine were always at the discretion of the court. Magna Carta, "1215, contained a clause (c. 20) providing that penalties should not "be excessive (see Stubbs, Charters, p. 299); and by the Bill of Rights, "1688, it was provided that excessive fines should not be imposed, "nor cruel or unusual punishments inflicted.... But there is no "doubt, and it was recognised in *Reg. v. Castro*[3], that a court had a "right to impose imprisonment and a fine at its discretion." Then, referring to the change in practice which followed after the intro-

1 [1951] 1 K.B. 394.
2 Ibid. 396.
3 (1880) 5 Q.B.D. 490.

duction of penal servitude, he added this: "Of late years the courts "have been very reluctant to impose a penalty more severe than that "of two years' imprisonment, but that has been because, until the "reforms which took place during the latter part of the nineteenth "century, imprisonment was a severe punishment. In the days when "shot drill, crank drill and the tread mill were common everyday "accompaniments of imprisonment, at least of imprisonment with "hard labour, a sentence of two years' imprisonment was, no doubt, "regarded as a very severe sentence, and where a sentence of over "two years was provided for a statutory offence the statute usually "imposed a sentence of penal servitude. Penal servitude was served in "convict establishments. The discipline and the work were very "different from that in ordinary prisons. The Penal Servitude Act, "1891, s. 1, sub-s. 2, provided that when a sentence of penal servitude "was prescribed by a statute a sentence of not exceeding two years' "imprisonment could be given instead. That is why courts frequently "gave sentences of imprisonment for not more than two years for "offences for which penal servitude up to fourteen years, or penal "servitude for life, could be given, but that did not affect their right to "give longer sentences of imprisonment for common-law mis- "demeanours."

Lord Goddard next considered the changes in prison discipline and punishments which culminated in those brought about, in England, by the Criminal Justice Act, 1948, and, in Northern Ireland, by the Criminal Justice Act (Northern Ireland), 1953, whereby penal servitude was abolished and imprisonment substituted for the various forms of detention previously authorised. After this Lord Goddard continued[1]: "It therefore follows that the reasons which led courts as "a rule to confine sentences of imprisonment for common-law mis- "demeanours to two years have disappeared." And later[2]: ". . . .it is "still the law—and it is just as well that it should be laid down and "understood—that for common-law misdemeanours and any other "offences for which a statute has not prescribed any particular period "of imprisonment, the law is and always has been that the court can "sentence to a term of imprisonment and a fine at its discretion, "provided"—and here Lord Goddard is obviously thinking of Magna Carta and the Bill of Rights—"that it does not give an inordinately "heavy sentence."

In *R. v. Bryan*[3] the Court of Criminal Appeal followed the decision in *R. v. Morris*[4] and refused to interfere with a sentence of

1 [1951] 1 K.B. at 397.
2 Ibid. 398.
3 (1951) 35 Cr. App. R. 121.
4 [1951] 1 K.B. 394.

ten years' imprisonment for conspiracy to break and enter and steal. Then, later in the same year, in *R. v. Higgins*[1], the doctrine of *R. v. Morris*[2] was applied to a case of attempted housebreaking. Here, again, the offence charged was a common law misdemeanour for the punishment of which no specific statutory provision was made. In delivering the judgment of the court Lord Goddard, after a reference to the Penal Servitude Act of 1891, said[3]: "It was very "largely because of that Act that the idea became general that no "sentence of imprisonment could exceed two years, and we do not "suppose that, at any rate in modern times, any sentence was ever "passed of imprisonment with hard labour for a period in excess of "two years. Penal servitude and imprisonment with hard labour are "now abolished, and accordingly there is no reason why a court "should not impose a longer sentence of imprisonment than two "years except in cases where the period is limited by the statute "creating the offence to two years or less. It may well be that a court "would consider that a more severe sentence than two years should "be imposed upon a man with a long record of crime who was "attempting to commit a felony such as housebreaking or burglary, "for which he would be liable perhaps to imprisonment for life, and "failed in the attempt merely because he was disturbed during his "attempt or for some other reason was unable to effect his purpose. "At the same time we think that a sentence exceeding two years for a "common-law misdemeanour should only be imposed in serious "cases well illustrated by *Morris's* case[2], or, where the misdemeanour "is an attempt to commit a crime and the convicted person is one who, "if he had achieved his end, would obviously have received a severe "sentence."

The effect of the decision in *R. v. Morris*[2] has therefore been to revive powers of punishment which had been dormant for a considerable period, and, naturally enough, this has led to certain anomalies. But the decision itself was not challenged before us, and in our opinion the present position must be taken as stated in *R. v. Morris*[2]. We can see no good reason for departing from the principle, there enunciated, that, in the absence of some statutory provision leading to a different conclusion, a common-law misdemeanour remains punishable with imprisonment at the discretion of the court.

That there is no enactment dealing specifically with the offence of attempted rape in this country has already been noted. It remains to

1 [1952] 1 K.B. 7.
2 [1951] 1 K.B. 394.
3 [1952] 1 K.B. at 10

enquire whether any limitation on the power to punish this offence at discretion is to be implied from the more general provisions of our criminal legislation. The power to imprison, without limitation, for common-law misdemeanours such as attempts may be said to invite restriction, particularly when, as is now the position, the statute book limits the sentences of imprisonment that may be imposed for graver types of crime in numerous instances. The question, then, is whether such a restriction is to be found as a matter of implication in the case of attempted rape.

An instance of an implied restriction of the common law power of punishment is afforded by the decision of the Court of Criminal Appeal in *Reg. v. Pearce*[1]. There, the accused was convicted of attempting to take and drive away a motor-car without the consent of the owner. Under the Road Traffic Act, 1930, the maximum punishment for the full offence of taking and driving away without consent was twelve months' imprisonment, but the accused was sentenced for the attempt to three years' corrective training. To make him eligible for that sentence the offence committed had to be one "punishable "with imprisonment for a term of two years or more" under section 21 (1) of the Criminal Justice Act, 1948. The accused could not, therefore, have been sent to corrective training if he had committed the full offence. The court held that the sentence of corrective training should not have been passed on the ground that *an attempt* to commit an offence punishable with less than two years' imprisonment as the maximum could not be regarded as "an offence punishable with "imprisonment for a term of two years or more." As Lord Goddard said[2]: ". . . . if for the full offence Parliament has laid down a definite "period, it is wrong that a longer sentence should be given for an "attempt than could have been given for the substantive offence." In our opinion this decision did more than correct the trial judge in the exercise of a wide discretion. It decided that the attempt was not "punishable" with more than two years' imprisonment because it was not punishable with more than one year's imprisonment. It was a ruling on a point of law and the result of it seems necessarily to be that the common law power to punish an attempt cannot in law go beyond the maximum provided by Parliament for the completed offence. The restriction comes from the relevant statute as a matter of implication..

On its facts this decision does not help the appellant since the maximum punishment for rape is imprisonment for life; but it shows

[1] (1952) 36 Cr. App. R. 149. [2] Ibid. 151.

that the common law power can be restricted by implication and so prompts the question whether in the present case a like implication can be drawn from the statute book which will have a similar limiting effect. We have come to the conclusion that such an implication ought to be drawn and that the relevant enactment is section 38 of the Offences against the Person Act, 1861, which (so far as material) provides: "Whosoever shall assault any person with intent to commit "felony. . . . shall be guilty of a misdemeanour, and being convicted "thereof shall be liable, at the discretion of the court, to be imprisoned "for any term not exceeding two years. . . ."

An assault with intent to rape undoubtedly comes within this section and that has long been recognised. See, for example, Archbold, 26th (1922) ed. p. 962, where, in a form of indictment under the section, the particulars of offence given are that "A.B. on the "day of , in the county of , "assaulted C.D. with intent to ravish her." In law this is a different offence from an attempt to rape in the sense, at any rate, that an indictment for one will not permit of a conviction for the other. But, in reality, an attempt to rape amounts to the commission of an offence under section 38 and an assault with intent to rape must, almost always, mean an attempt to rape. In their substance the offences are so nearly identical that it is difficult to think that Parliament, after imposing a maximum sentence of two years' imprisonment for an assault with intent, should have intended the attempt to remain punishable at the discretion of the court and without any limitation at all. The general nature of section 38 implies a general standard of punishment and we think the proper implication is that that standard was intended to apply to all that in point of fact and substance fairly comes within the ambit of the section but is punishable only at common law as a misdemeanour. If, to apply the reasoning of *Reg. v. Pearce*[1], it is wrong that the attempt should be punishable more severely than the completed offence, it seems also wrong that the attempt should be punishable more severely than Parliament has provided for what is virtually the same thing. Whether the view which the Attempted Rape Act, 1948, was passed to alter was based on the provisions of section 38 does not appear, but the fact that Parliament legislated for a seven year maximum can only be regarded as a step taken to increase, and not to reduce, the previous maximum and as indicating Parliamentary acceptance of the prevailing opinion that two years' imprisonment was the most that could be imposed for attempted rape.

[1] (1952) 36 Cr. App. R. 149.

For these reasons we are of opinion that the sentence passed on the appellant should not have exceeded two years' imprisonment.

The next question is what the appropriate sentence should be. Though the appellant is young and has no record that need be noticed in this connection, his conduct was reprehensible to a degree. The depositions reveal a planned and cowardly attack on an unescorted woman which cannot be condemned too strongly. We think that nothing less than the maximum sentence which we have held applicable can meet the case, and we will, accordingly, substitute a sentence of two years' imprisonment, to run without interruption from January 24, 1958, the date of conviction.

Appeal allowed.
Sentence varied.

Solicitor for the appellant: *J. McRobert.*

Solicitor for the Crown: *W. T. J. Bradley.*

J.P.

IN RE MID-ULSTER ELECTION PETITION: BEATTIE v. MITCHELL[1]

Parliament—Election petition—Disqualification—Knowledge of electors—Votes thrown away—Forfeiture Act, 1870 (33 & 34 *Vict. c.* 23), *s.* 2—*Representation of the People Act*, 1949 (12, 13 & 14 *Geo.* 6, *c.* 68), *Part III.*

At the general election for the Parliament of the United Kingdom in May 1955, the petitioner and the respondent were the only candidates for the seat to represent Mid-Ulster. The respondent polled a narrow majority of the votes and was declared elected. Thereafter it was declared by Parliament that the respondent had been incapable of and disqualified from being elected or sitting or voting as a member of Parliament by reason of the fact that at the time of the election he was serving a sentence of ten years' imprisonment for treason felony, and it was accordingly declared that the seat was vacant. The respondent's sentence was imposed on him upon his conviction at the Winter Assizes in December 1954, on a charge arising out of his participation in an armed raid on a military barracks at Omagh—the principal town in the constituency—in October 1954.

At the by-election held in August 1955, in consequence of the seat having been declared vacant, the petitioner and the respondent were again the only candidates nominated, and again the respondent polled a narrow majority of the votes and was returned as elected. The petitioner thereupon applied to the Queen's Bench Division of the High Court under the provisions of the Representation of the People Act, 1949, for a determination that the respondent had not been duly elected or returned, and that he, the petitioner, had been duly elected and ought to have been returned.

At the hearing of the petition the respondent's conviction and sentence and the fact that he was still undergoing sentence were proved, and evidence was adduced that the respondent's trial and his conviction and sentence had been widely publicised at the time in newspapers circulating in the constituency; that at the time of the general election these matters had again been widely publicised; that the proceedings in Parliament leading to the declaration of the respondent's disqualification had been reported in the constituency by the press and in radio news bulletins; and that attention had been publicly drawn to all these matters in the course of the by-election campaign. It also appeared that the respondent's address as stated on the ballot papers at both elections was "H.M. Prison, Belfast."

Held, that, on the evidence, the facts leading to the respondent's disqualification had received such wide publicity as to cause them to be notorious throughout the constituency, and that the petitioner had therefore established that a sufficient number of the votes cast for the respondent had been so cast with knowledge of the facts leading to his disqualification and were to be regarded as not given at all or thrown away, and that accordingly the petitioner was entitled to the determination sought.

[1] In the Queen's Bench Division before Black L.J. and Sheil J.: October 5, 6, 7, 1955.

Held further that a notice sent out by the petitioner to all the electors with his election address was of itself an insufficient notice of the facts leading to the respondent's disqualification, in that it merely stated that the respondent was a convicted felon, and did not specify that he had been sentenced to a term of imprisonment in excess of twelve months and was still undergoing sentence.

PARLIAMENTARY ELECTION PETITION to the Queen's Bench Division pursuant to Part III of the Representation of the people Act, 1949. The petitioner, Charles Beattie, claimed to have had a right to be elected and returned as member of Parliament for mid-Ulster at a by-election held on August 11, 1955, in place of the respondent, Thomas James Mitchell, whose election was complained of.

The facts appear sufficiently in the head-note and in the judgment of the court.

McCoy Q.C., *Jones Q.C.* and *Lowry* for the petitioner. The respondent is clearly disqualified: see Forfeiture Act, 1870, s. 2 and Treason Felony Act, 1848, s. 3.

If the facts constituting disqualification were known to the electorate, then the petitioner ought to be returned, since the votes given by electors with knowledge of the facts constituting disqualification are to be regarded as thrown away, and the next candidate having a majority of valid votes is entitled to be declared elected: see Schofield on Parliamentary Elections, 2nd ed. p. 323, *Drinkwater v. Deakin*[1], *Beresford-Hope v. Lady Sandhurst*[2], *County Tipperary Election Petition*[3].

We submit that the clear inference from the evidence in this case is that the facts were notorious in the constituency, and that accordingly the petitioner ought to be declared elected.

The respondent appeared in person.

Cur. adv. vult.

SHEIL J. delivering the judgment of the court: The questions for the determination of the court arise upon a petition by Mr. Charles Beattie, one of the candidates at an election for membership of the Parliament of the United Kingdom for the constituency of Mid-Ulster held on August 11, 1955. The candidates at the election were the petitioner Mr. Beattie and the respondent Mr. Thomas

[1] (1874) L.R. 9 C.P. 626, 642.
[2] (1889) 23 Q.B.D. 79, 94.
[3] (1875) I.R. 9 C.L. 173; 217.

James Mitchell. The number of votes cast in favour of Mr. Mitchell was 30,392 and the number in favour of Mr. Beattie was 29,586. Mr. Mitchell was accordingly declared elected by a majority of 806 votes. The petitioner seeks in the first place to have it determined that Mr. Mitchell was not duly elected and in the second place he claims that he (Mr. Beattie) was duly elected and ought to have been returned.

The petitioner's claim that Mr. Mitchell was not duly elected or returned is based upon section 2 of the Forfeiture Act, 1870, by which it is provided (inter alia) that any person convicted of felony and sentenced to a term of imprisonment exceeding twelve months shall become and (until he shall have suffered the punishment to which he has been sentenced or such other punishment as by competent authority may be substituted for the same or shall receive a free pardon) shall continue thenceforth incapable of being elected or sitting or voting as a member of either House of Parliament. It was proved before us that on December 15, 1954, Mr. Mitchell was convicted at the Northern Ireland Winter Assizes of three charges of felony under section 3 of the Treason Felony Act, 1848 and was sentenced by the Lord Chief Justice of Northern Ireland to ten years' imprisonment. It was also proved that at the date of the election on August 11, 1955, Mr. Mitchell was and still is undergoing this sentence in Her Majesty's Prison at Belfast. In these circumstances it is clear that at the date of the election Mr. Mitchell was incapable of being elected as a member of Parliament and was not duly elected or returned and we so determine.

As to the petitioner's claim that he was duly elected and ought to have been returned he relies on the principle that if at the time of the election a candidate is disqualified from being elected to Parliament and if due notice thereof is given to the electors all votes given to that candidate by electors who have notice of the facts constituting the disqualification are considered as not given at all or thrown away. This principle is well established in cases where the disqualification of the candidate arises from his status, e.g. as a person who has been convicted of felony and sentenced to a term of imprisonment exceeding twelve months and is still serving the sentence. And in such cases it is also well established that in order to avoid an elector's vote it is only necessary to prove that the elector had notice of the facts creating the candidate's disqualification: it is not necessary to prove that he was aware of the legal consequence that such facts entailed disqualification. In support of these propositions we need only refer

to the judgment of Lord Coleridge C.J. in *Drinkwater v. Deakin*[1], to the judgments delivered in the English Court of Appeal in *Beresford-Hope v. Lady Sandhurst*[2], and to the well known Irish case of the *County Tipperary Election Petition*[3]. The result is that even if the candidate so disqualified receives a majority of the votes recorded, the candidate next on the poll may on petition be declared elected if he is found to have a majority of votes after deducting the votes so thrown away from the total votes given to the disqualified candidate. The position is clearly set out in the judgment of Lord Coleridge C.J. in *Beresford-Hope v. Lady Sandhurst*[4]: "I apprehend that both in *Gosling* "*v. Veley*[5] and in *Drinkwater v. Deakin*[1] and in other cases it has been "laid down over and over again, that if the fact exists which creates an "incapacity, and it is known, and must be known, to those persons "who voted for a candidate who is so incapacitated, votes given under "those circumstances are thrown away. As it is put in one of the "judgments, such votes are fairly enough thrown away, because the "persons would not do the only thing they ought to do to give effect "to their votes, namely, to vote for a properly qualified candidate.... "Where the incapacity is an incapacity of status so annexed by law to "the candidate it requires no proof; the fact of its being an incapacity "to which the law annexed the legal consequence is known to every "person who votes, and the persons who vote and who are aware of "the fact to which incapacity is attached, must in reason be held to be "aware of the consequence which attaches to their voting."

Our task on this branch of the case accordingly is to consider whether upon the evidence the petitioner has succeeded in establishing that a sufficient number of the electorate who recorded their votes for Mr. Mitchell must have voted for him with the knowledge that he was a person disqualified from being elected as a member of Parliament or with knowledge of the facts creating this disqualification.

The evidence relied upon by the petitioner goes back to the trial of Mr. Mitchell at the Northern Ireland Winter Assizes in December 1954. The case was one in which eight men from the Republic of Ireland, including Mr. Mitchell, were tried and convicted under the Treason Felony Act, 1848. The offences with which they were charged arose out of a raid upon Omagh Military Barracks on the night of October 16 or the early morning of October 17, 1954. The trial was naturally a matter of considerable public interest and copies of newspapers circulating in the constituency were put in evidence in which

[1] (1874) L.R. 9 C.P. 626.
[2] (1889) 23 Q.B.D. 79.
[3] (1875) I.R. 9 C.L. 173; 217.
[4] (1889) 23 Q.B.D. at 94.
[5] (1847) 7 Q.B. 406.

reports of portions of the trial, and especially the observations of the Lord Chief Justice in passing sentence, were conspicuously featured. One would naturally think that the trial was calculated to arouse particular interest in the constituency of Mid-Ulster inasmuch as the barracks which were the objective of the raid are situated on the outskirts of Omagh, the county town of Tyrone and the principal town within the Mid-Ulster constituency. Though the raid and the trial and the fact that eight participants in the raid had been sentenced to long terms of imprisonment were matters of great public interest it might well be that at that stage Mr. Mitchell's name would not stand out as one well known to the public. But at the General Election for the Parliament of the United Kingdom held on May 26, 1955, Mr. Mitchell was nominated as a candidate, his opponent being Mr. Beattie. Others of the prisoners convicted and sentenced in connection with the raid were nominated as candidates in other constituencies in Northern Ireland. It appears that before the election the Chief Whip of the Unionist party in the Parliament of Northern Ireland issued a statement warning electors that a number of candidates for constituencies in Northern Ireland were disqualified persons and stating that a convicted felon serving a term of imprisonment in excess of twelve months was a disqualified person and that votes knowingly given to such a person were lost or thrown away. This statement was reported both in Belfast papers circulating in the constituency and also in local papers which were put in evidence, and curiously enough appears to have been more fully set out in the papers which would naturally be read by supporters of Mr. Mitchell. These latter papers carried also a rejoinder by a Mr. Traynor, described as secretary of the Sinn Fein Executive and candidate for South Antrim, to the effect that Sinn Fein were already aware of the clause in the Representation of the People Act (*sic*) and that the election of a person serving penal servitude could be declared invalid and a new election held; that as far as they knew there was no legal basis for the statement that if a candidate was unseated the next nearest candidate could be declared elected; and that if another election was held they would contest the seats with the same candidates as before. The result of that election in the Mid-Ulster constituency was that at the poll Mr. Beattie obtained 29,477 votes while Mr. Mitchell obtained 29,737 votes and was declared elected. The fact, however, of Mr. Mitchell's conviction and his incapacity to be elected as a member was brought to the notice of the House of Commons at Westminster and on July 18, 1955, the House on the motion of the Attorney-General resolved that "Thomas J. Mitchell, returned as a member for Mid-Ulster,

"having been adjudged guilty of felony and sentenced to penal servi-
"tude for ten years and being now imprisoned under such sentence, is
"incapable of being elected or returned as a member of this House."
The House also resolved that the Speaker do issue his warrant to the
Clerk of the Crown for Northern Ireland to make up a new writ for
the electing of a member to serve for Mid-Ulster in the room of
Thomas J. Mitchell.

These decisions of the House of Commons obtained wide publicity in the press of Northern Ireland and very full reports of the discussions in the House were featured in newspapers circulating in the constituency. The petitioner's witnesses produced before us a large selection of newspapers, Belfast papers, Dublin papers and locally published papers circulating in Mid-Ulster carrying reports of the proceedings in Parliament. And we observed that the reports contained in the papers which would normally circulate among supporters of Mr. Mitchell were at least as full as those contained in papers which would normally be read by those favouring Mr. Beattie. There can be no doubt that widespread notice of the decision of the House declaring Mr. Mitchell disqualified was given by the press throughout the constituency. In addition an official of the British Broadcasting Corporation was called as a witness and produced a copy of the Northern Ireland news bulletin broadcast from the Northern Ireland station of the British Broadcasting Corporation on the evening of July 18, 1955. This bulletin included quite a full synopsis of the discussion that afternoon in the House. One of the witnesses also deposed that on the same evening he heard the matter included in a news bulletin broadcast by Radio Eireann.

The Speaker of the House of Commons duly issued his warrant directing the issue of a writ for a fresh election. As previously stated this election was held on August 11, 1955, and Mr. Beattie and Mr. Mitchell were again the candidates. In view of the publicity which Mr. Mitchell's disqualification by the House of Commons had received and indeed of the very fact of a fresh election with the same two candidates being held just eleven weeks after the general election at which Mr. Mitchell had been returned as member for the constituency, we are satisfied that few, if any, electors in the constituency can have been unaware of Mr. Mitchell's disqualification or of the facts causing that disqualification. A copy dated August 6, 1955, of a newspaper published in the constituency, the "Ulster Herald," which we were informed enjoyed a substantial circulation and which obviously favoured Mr. Mitchell's candidature and would pre-

sumably be read principally by his supporters, was put in evidence. This paper carried an article having a heading five or six columns wide reading: "Prisoner-candidate again fights defeated Unionist "nominee"; and the article contained in heavy type the statement: "Mr. Mitchell, who is standing again, is a Sinn Fein candidate and "is presently serving a ten-year sentence in Belfast Gaol for his part "in the armed raid on Omagh military barracks in October of last "year."

We also had it in evidence that the fact that Mr. Mitchell was serving a ten year sentence in Belfast Prison for his part in the raid on Omagh military barracks was also mentioned in news bulletins regarding the by-election broadcast from the Northern Ireland station of the British Broadcasting Corporation on July 25, July 26 and August 10, 1955.

It was also proved to us that the petitioner's election address at the by-election was sent by post before the election to all the electors on the register. This address which was printed on a post card contained in conspicuous type the following paragraph: "I would draw "your attention to the fact that Thomas James Mitchell, who has "been nominated as a candidate at this election, is a convicted felon, "and therefore disqualified from sitting as a member of Parliament "and any votes cast for him will be thrown away, and will be wholly "null and void."

As a notice of Mr. Mitchell's disqualification this paragraph is obviously defective. It does not set out fully the facts causing his disqualification. Mr. Mitchell's disqualification did not arise merely because he had been convicted of felony as the wording of the paragraph suggests but because he was sentenced to a term of imprisonment in respect of that felony exceeding twelve months and was still undergoing his imprisonment. The paragraph however should not be completely ignored since it would serve to recall even to electors of short memory, if any there be, the history of the facts leading to Mr. Mitchell's disqualification.

One other fact of significance should be mentioned, namely that on the ballot paper Mr. Mitchell's address, as taken from his nomination paper, was stated as "H.M. Prison, Belfast."

We are satisfied on the evidence given before us that the facts leading to Mr. Mitchell's disqualification, and indeed the fact that he was by law disqualified, had received such widespread publicity as to cause them to be notorious throughout the constituency and that on

August 11, 1955, very few electors indeed could have pretended ignorance of these facts.

We therefore determine that the petitioner Charles Beattie was duly elected and ought to have been returned.

We shall certify our determination to the Speaker of the House of Commons as required by section 124 of the Representation of the People Act, 1949.

Determination certified accordingly.

Solicitor for the petitioner: *A. J. Monteith*[1].

[1] This case is reported *ex relatione* R. L. E. Lowry, Esq., Q.C., who, as Mr. R. L. E. Lowry, was junior counsel for the petitioner.

IN RE FERMANAGH AND SOUTH TYRONE ELECTION PETITION: GROSVENOR v. CLARKE[1]

Parliament—Election petition—Disqualification—Knowledge of electors—Votes thrown away—Forfeiture Act, 1870 (33 & 34 *Vict. c.* 23), *s.* 2.—*Representation of the People Act*, 1949(12, 13 & 14 *Geo.* 6, *c.* 68),*Part III.*

At the general election for the Parliament of the United Kingdom in May 1955, the petitioner and the respondent were the only candidates for the seat to represent Fermanagh and South Tyrone. The respondent polled 30,529 votes and the petitioner polled 30,268. The respondent was accordingly declared returned by a majority of 261. The petitioner applied to the Queen's Bench Division of the High Court under the provisions of the Representation of the People Act, 1949, for a determination that the respondent had not been duly elected or returned and that he, the petitioner, had been duly elected and ought to have been returned, for the reason that the respondent at the time of the election was to the knowledge of the electors serving a sentence of ten years' imprisonment for treason felony.

Evidence was adduced that the respondent had been convicted of an offence under section 3 of the Treason Felony Act, 1848, at the Winter Assizes in 1954, and that he was still undergoing the sentence of ten years' imprisonment which had been imposed upon him, and it was also given in evidence that advertisements reciting these facts and giving notice that as a result the respondent was disqualified from being elected had been published in newspapers circulating in the constituency; that the respondent's disqualification had been discussed in the news columns of the same and other newspapers; that the petitioner's agents had sent by post to 30,121 electors believed not to be supporters of the petitioner leaflets to the same effect as the advertisements, and that posters in similar terms had been exhibited near most of the polling stations in the constituency on polling day. It also appeared that the address of the respondent as stated on the ballot papers was "H.M. Prison, Crumlin Road, Belfast."

Held that the disqualification of the respondent was a matter of notoriety throughout the constituency and that a number of persons far in excess of his majority had recorded their votes with knowledge of his disqualification, and that accordingly the petitioner was entitled to the determination sought.

PARLIAMENTARY ELECTION PETITION to the Queen's Bench Division of the High Court pursuant to Part III of the Representation of the People Act, 1949. The petitioner, Robert George Grosvenor, claimed to have had the right to be elected and returned as member of Parliament for Fermanagh and South Tyrone at the general election held on May 26, 1955, in place of the respondent, Philip Christopher Clarke, whose election was complained of.

[1] In the Queen's Bench Division, before Black L.J. and Sheil J.: Aug. 30, 31, Sept. 1, 2, 1955.

The facts appear sufficiently in the headnote and in the judgment of the court.

McCoy Q.C., *Jones Q.C.* and *Lowry* for the petitioner.

The respondent did not appear and was not represented.

Cur. adv. vult.

BLACK L.J. delivering the judgment of the court: At an election for membership of the Parliament of the United Kingdom for the constituency of Fermanagh and South Tyrone held on May 26, 1955, the candidates were the petitioner, Robert George Grosvenor, and the respondent, Philip Christopher Clarke. The total number of the electorate of the constituency was 65,686. The number of votes recorded in favour of the respondent was 30,529 and the number in favour of the petitioner was 30,268. The respondent Mr. Clarke was accordingly declared returned by a majority of 261.

The petitioner seeks to have it determined that Mr. Clarke was not duly elected and returned, and further claims that he, the petitioner, was duly elected and ought to have been returned.

The ground upon which the petitioner claims that Mr. Clarke was not duly elected and returned was that Mr. Clarke had been convicted of felony and had been sentenced to a term of imprisonment exceeding twelve months and that at the date of the election he was still undergoing the punishment to which he had been sentenced and that accordingly by reason of the provisions of section 2 of the Forfeiture Act, 1870, he was incapable of being elected as a member of Parliament. It was proved before us that at the Northern Ireland Winter Assizes held at Belfast in November and December 1954, Mr. Clarke was found guilty of three counts of treason felony contrary to section 3 of the Treason Felony Act, 1848, and that on December 15, 1954, judgment was given that he be sentenced to ten years' imprisonment on each count, the sentences to run concurrently. It was also proved that at the date of the election Mr. Clarke was and, indeed, still is imprisoned in Her Majesty's Prison at Belfast undergoing this sentence. In these circumstances it is clear that by virtue of the provisions of section 2 of the Forfeiture Act, 1870, Mr. Clarke was at the date of election on May 26, 1955, incapable of being elected as a member of Parliament and was not duly elected or returned and we so determine.

As regards the petitioner's claim that he was duly elected and ought to have been returned the petitioner relies on the principle that if a candidate is at the time of the election disqualified from being elected to Parliament and if due notice is given to electors of that fact all votes given to that candidate by electors who have notice of the facts constituting the disqualification are considered as not given at all or thrown away. The result is that even if the candidate so disqualified receives a majority of the actual votes recorded, the candidate next on the poll may on petition be declared elected if he is found to have a majority of votes after deducting the votes so thrown away from the total votes given to the disqualified candidate. Here the disqualification of Mr. Clarke is a disqualification arising from his status, from the fact that he had been convicted of a felony and sentenced to a term of imprisonment exceeding twelve months, and was still serving that sentence. In such cases it is well established that in order to avoid an elector's vote it is only necessary to prove that the elector had notice of the fact creating the candidate's disqualification. It is not necessary to prove that he was aware of the legal result that such a fact entailed disqualification.

The petitioner's contention was that it had been made abundantly clear to the electorate that Mr. Clarke had been convicted of felony and that at the date of the election he was a person undergoing a term of imprisonment of more than one year's duration.

The petitioner's agent caused advertisements of double column width to be inserted in three newspapers circulating in the constituency, namely, the "Tyrone Courier and Dungannon News" of Thursday, May 19, 1955; the "Impartial Reporter and Farmers' Journal"—an Enniskillen paper—also of Thursday, May 19; and the "Tyrone Constitution" of Friday, May 20. Copies of these newspapers containing these advertisements were produced in evidence before us. The advertisements recited that Mr. Clarke had been convicted of treason felony at the Ulster Winter Assizes in Belfast on December 15, 1954, and sentenced to ten years' imprisonment and was still serving the sentence, and that by reason of the said matter he was by law incapacitated and disqualified for being a member of Parliament. The advertisements then went on: "Now take "notice that all votes given for the said Philip Christopher Clarke at "the said election will be thrown away and will be wholly null and "void." These newspapers also contained news items intended to convey that the respondent was disqualified for election. It is clear

from a perusal of these newspapers that they would circulate mainly among supporters of the petitioner rather than among supporters of Mr. Clarke, though the proprietor of the "Impartial Reporter and Farmers' Journal" estimated in his evidence that the circulation of that paper would be to the extent of 75% among the supporters of the petitioner and to the extent of 25% among the supporters of Mr. Clarke.

There were also produced to us copies of newspapers circulating in the constituency which would obviously find their readers among supporters of Mr. Clarke rather than among supporters of the petitioner. These were the "Fermanagh Herald" and the "Ulster Herald" of May 21, 1955, apparently two editions of the same paper, and the "Dungannon Observer", also of May 21, 1955. All these papers contained in their news items a statement attributed to the Secretary of the Sinn Fein Executive to the effect that Sinn Fein were already aware of a clause in the Representation of the People Act that the election of a person serving penal servitude could be declared invalid and a new election held but that so far as they knew there was no legal basis for the statement that if a candidate was unseated the next nearest candidate could be declared elected. These statements purported to be in reply to a statement issued by the Unionist party and quoted in these papers that a convicted felon serving a term of imprisonment in excess of twelve months is a disqualified person and that votes knowingly given to such a person are lost and thrown away. It was also proved by a witness that on the evening of the close of the nominations he had heard this statement by the Unionist party quoted verbatim during the reading of the Northern Ireland news of the British Broadcasting Corporation, and that he heard it also on the same evening from the Athlone station of Radio Eireann, though these statements did not give the names of the persons alleged to be disqualified.

It was also proved that on May 23 and 24 there were sent by post by the petitioner's agent to 30,121 electors leaflets headed "Notice of "Disqualification of Candidate" and phrased in substantially the same terms as the advertisements already mentioned in the "Tyrone Courier and Dungannon News", the "Impartial Reporter and Farmers' Journal" and the "Tyrone Constitution". The petitioner's agent stated in evidence that the 30,121 persons to whom these leaflets were addressed were chosen as individuals believed by him from his long experience of the constituency not to be supporters of the petitioner.

Then on the day of the election the petitioner's agent caused posters measuring about 21 inches by 15 inches to be exhibited in the vicinity of the great majority of the polling stations in the constituency. These posters were headed in large type "Notice of "Disqualification of Candidate" and were phrased substantially as the advertisements published in the newspapers to which we have already referred. It was proved in evidence by a large number of witnesses that save in fourteen of the 132 polling places in the constituency such posters were prominently displayed in close proximity to the several polling places and that except in a very few places such posters remained so displayed on the day of the poll throughout the hours of poll (7 a.m. to 9 p.m.).

Furthermore, it appeared from copies of the ballot paper produced by the returning officer that Mr. Clarke was described thereon as of H.M. Prison, Crumlin Road, Belfast.

In the result we are satisfied that Mr. Clarke's disqualification was a matter of notoriety throughout the constituency and that a number of persons far in excess of the majority obtained by him recorded their votes in his favour with full notice of his disqualification.

We accordingly determine that the petitioner, Robert George Grosvenor, was duly elected and ought to have been returned.

In view of the foregoing we are of opinion that it is not necessary to pass upon the petitioner's application for a scrutiny further than to say that in view of the terms of the proviso to rule 57 (3) of the Rules contained in the Second Schedule to the Representation of the People Act, 1949, the matter appears to us to be one of considerable difficulty.

We propose to certify our determinations to the Speaker of the House of Commons in compliance with the requirements of section 124 of the Representation of the People Act, 1949.

Determination certified accordingly. The petitioner's costs, other than the costs arising on the application for a scrutiny, ordered to be paid by the respondent.

Solicitor for the petitioner: *George E. Warren*[1].

1 This case is reported *ex relatione* R. L. E. Lowry, Esq., Q.C., who, as Mr. R. L. E. Lowry, was junior counsel for the petitioner.

MINISTER OF PENSIONS v. GREER[1]

Pension—Entitlement—Claim made more than seven years after termination of military service—Onus of proof—Scope of "reasonable doubt"—Royal Warrant of May 24, 1949, (*Cmd.* 7699), *art.* 5.

Article 5 of the Royal Warrant of May 24, 1949, provides that in determining whether to certify that death or disablement is due to a service factor "where, upon reliable evidence, a reasonable doubt exists.... the benefit of that doubt shall be given to the claimant."

Held, that if a reasonable doubt arises upon reliable evidence the claimant is entitled to the benefit of that doubt notwithstanding that there is a strong preponderance of probability against the claimant's case.

If there is reliable evidence upon which a reasonable doubt could arise, it is for the tribunal to decide whether such doubt exists.

Meaning of the words "reasonable doubt" in paragraph (4) of article 5 considered.

CASE STATED by the Chairman of the Pensions Appeal Tribunal.

On September 6, 1954, the respondent claimed a pension under article 5 of the Royal Warrant of May 24, 1949,[2] on the ground that his disablement was due to a disease, pulmonary tuberculosis, which was attributable to, or aggravated by, his service in the military forces after September 2, 1939. The respondent's claim to a pension having been rejected by the Minister, he appealed under section 1 (1) of the Pensions Appeal Tribunals Act, 1943, and the tribunal allowed his appeal.

The respondent had first enlisted in the army on September 30, 1924, and served until February 28, 1932, when he was transferred to

[1] In the Queen's Bench Division before Black L.J.: Jan. 13, July 7, 1958.

[2] Royal Warrant of May 24, 1949 (Cmd. 7699), art. 5:
"5. *Entitlement where a disablement is claimed or death takes place more than "seven years after the termination of service.*—(1) Where, after the expiration of "the period of seven years beginning with the termination of the service of a "member of the military forces, a claim is made in respect of a disablement of "that member, or in respect of the death of that member.... such disablement "or death, as the case may be, shall be accepted as due to service for the "purposes of this Our Warrant provided it is certified that—
"(a) the disablement is due to an injury which—
"(i) is attributable to service; or
"(ii) existed before or arose during service and has been and remains "aggravated thereby; or
"(b) ....
"(2) A disablement or death shall be certified in accordance with paragraph (1) "of this Article if it is shown that the conditions set out in this Article and "applicable thereto are fulfilled.
"....
"(4) Where, upon reliable evidence, a reasonable doubt exists whether the "conditions set out in paragraph (1) of this Article are fulfilled, the benefit of "that reasonable doubt shall be given to the claimant."

the reserve. On May 13, 1938, he re-enlisted in the army and served continuously until his discharge on October 28, 1945. His discharge was not on account of any disablement and he showed no symptoms of tuberculosis during his service. During the period between his discharge and May 1950, the respondent did not have any medical attention, but in May 1950, an X-ray examination disclosed signs of pulmonary tuberculosis which was then well established. His only previous symptoms of the disease had been a cough which had persisted for some two years and loss of weight, the beginning of which could not be dated. He underwent periodical medical examinations from May 1950, until August 1953, during which period his tuberculosis was active and progressed slowly and steadily. In 1954 his condition deteriorated quickly, and to a marked degree. The tribunal found that the conditions of military service expose members of the forces to considerably greater danger of tubercular infection than do the ordinary conditions of civilian life; that while serving in the forces the respondent was exposed to the ordinary service risks of tubercular infection; that he was not exposed to any unusual risk of infection after his discharge from the army; and that the pulmonary tuberculosis in respect of which he claimed a pension was not contracted before September 3, 1939.

The tribunal accepted the medical opinions relied upon by the Minister as establishing clearly a preponderance of probability in favour of the view that the respondent's pulmonary tuberculosis originated after his service finished and was not caused by any service factor. On the other hand, the tribunal were of opinion that the Minister was wrong in concluding that this preponderance of probability had been established beyond reasonable doubt, and took the view that the relatively slow and gradual development of the disease between 1950 and 1953 taken together with the condition of the disease as disclosed in the earliest of the X-ray plates indicated a real and substantial possibility that the disease had originated before the respondent's service ended. They accepted the medical evidence called on the respondent's behalf as reliable evidence, and held that upon that evidence a possibility existed that the respondent's tubercular disease originated in an infection which occurred during his service and which resulted from service conditions. They further held that this possibility was not remote or fanciful but real and substantial, and that the respondent was therefore entitled by virtue of paragraph (4) of article 5 of the Royal Warrant to have recorded a finding that his pulmonary tuberculosis was attributable to service.

On the application of the Minister this case was stated for the the opinion of High Court asking:

(i) whether the tribunal misdirected itself in law as to the meaning and effect of paragraphs (2) and (3) of article 4 and paragraph (4) of article 5 of the Royal Warrant.

(ii) whether the tribunal, having found that the evidence established a clear preponderance of probability in favour of the view that no service factor was a cause of the claimant's disablement, was wrong in law in deciding that the respondent was entitled to have recorded a finding that the said disablement was due to a disease which was attributable to service.

(iii) whether there was evidence before the tribunal which the tribunal was entitled to accept as reliable and upon which the tribunal was entitled to hold that a reasonable doubt existed whether the conditions set out in paragraph (1) of article 5 of the Royal Warrant were fulfilled.

Nicholson Q.C. and *Wilkinson* for the Minister.

Jones Q.C. and *Shaw* for the respondent.

BLACK L.J. stated the facts and continued: Inasmuch as the respondent's claim was not made until after the expiration of the period of seven years from the termination of his service in the forces it fell to be dealt with under the provisions of article 5 of the Royal Warrant. In delivering the judgment of the tribunal the chairman contrasted the position under article 4 (which deals with claims made not later than seven years after the termination of service) with the position under article 5, and expressed the opinion that the only real difference between the provisions of paragraph (2) of article 4 and the relevant provisions of article 5 is that in a case under article 4 the Minister has to exclude a reasonable doubt, and in a case under article 5 the claimant has to give or point to evidence which can be relied upon as raising a reasonable doubt.

The basic condition of awards of service pensions under the Royal Warrant of May 1949 is laid down in article 3 of the Warrant. That article prescribes that awards may be made where the disablement or death of a member of the military forces is due to service.

Article 4 then proceeds to deal with claims made not later than seven years after the termination of service. Paragraph (1) of article 4 provides that when a claim in respect of a disablement of a member of the military forces is made not later than seven years after the

termination of his service such disablement shall for the purposes of the Warrant be accepted as due to service, provided it is certified that the disablement is due to an injury which is attributable to service or has been and remains aggravated by service. And by article 1 (13) of the Warrant injury is defined as including disease. Then by paragraph (2) of article 4 it is provided that subject to certain provisions (which I do not think need trouble us in the present case) in no case shall there be an onus on any claimant under the article to prove the fulfilment of the conditions set out in paragraph (1) and the benefit of any reasonable doubt shall be given to the claimant.

The effect of these provisions is that where a claim in respect of a disablement is made within the seven years there is no necessity for the claimant in the first instance to adduce any proof that the disablement is attributable to his service. If upon investigation the Ministry are not minded to concede the claim the onus will be upon them to establish that the disablement was not attributable to the claimant's service. It will then of course be open to the claimant to attempt by counter-evidence and argument to meet and deal with the evidence and arguments adduced by the Ministry in opposition to his claim. It will be the duty of the tribunal to which it falls to adjudicate on the claim to consider and weigh the evidence and contentions adduced in opposition to the claim and the evidence and contentions (if any) put forward in support of it, but they are not to decide the issue in the way in which a claim in an ordinary civil action would be decided by having regard merely to which way the balance of probabilities appears to lie, for if upon due consideration they feel that there is any reasonable doubt about the matter they must give the benefit of that doubt to the claimant.

Article 5 of the Royal Warrant deals as I have said with claims (such as the present one) made after the expiration of seven years from the termination of the claimant's service. Paragraph (1) of article 5 provides that where after the seven years a claim in respect of a disablement is made the disablement shall be accepted as due to service provided it is certified that the disablement is due to an injury which is attributable to service or has been and remains aggravated by service. So far the provisions of article 5 follow those of article 4. But article 5 contains no provision similar to that contained in paragraph (2) of article 4 that in no case shall there be an onus on any claimant under the article to prove the fulfilment of the conditions set out in paragraph (1) of the article. On the contrary, paragraph (2) of article 5 provides that a disablement shall be certified in accordance

with paragraph (1) if it is shown that the conditions set out in the article applicable thereto are fulfilled. So far from the onus of establishing a claim under article 5 being removed from the claimant this paragraph appears to me to throw upon the claimant the obligation of showing that his disablement is attributable to his service. He must accordingly in the first instance put forward evidence sufficient to constitute a prima facie case in support of his claim. If the Ministry do not concede the claim they will be entitled to put forward such evidence and contentions in opposition to it as they consider necessary. The tribunal which has to adjudicate upon the claim will consider and weigh the evidence and contentions put forward on each side but in doing so they must have regard to the provisions of paragraph (4) of article 5. This paragraph reads: "Where, upon reliable evidence, a reasonable doubt exists whether "the conditions set out in paragraph (1) of this article are fulfilled, "the benefit of that reasonable doubt shall be given to the claimant." This is what the tribunal have professed to do in the present case. They have held that on reliable evidence a reasonable doubt can be said to exist as to whether or not the claimant's illness is attributable to his service and accordingly they have decided his claim in his favour.

This view of the effect of paragraph (4) of article 5 appears to me to accord with the view taken both by the English and the Scottish courts. In *Dickinson v. Minister of Pensions*[1], Ormerod J. dealing with paragraph (4) says: "I am satisfied that the intention of the "paragraph is that it is the duty of the claimant to produce reliable "evidence to establish his claim, but if (after hearing and considering "that reliable evidence, and making a comparison between such "evidence and other evidence which is called on behalf of the Ministry "to contradict, or to controvert it) the tribunal has a reasonable "doubt, then in those circumstances the plain meaning of that para- "graph of the article is that the benefit of that doubt shall be given to "the claimant." And in *Ritchie v. The Minister of Pensions and National Insurance*[2] the Court of Session remitted the stated case to the Pensions Appeal Tribunal to answer the following question (the terms of which were settled by consent of the parties): "Having "regard to the whole evidence were the tribunal satisfied that the "Appellant had not established a reasonable doubt whether the "conditions of Article 5 (1) (b) of the Royal Warrant were fulfilled?"

[1] [1953] 1 Q.B. 228, 233.

[2] (1956) Reports of Selected War Pensions Appeals Vol. II, 951.

The real point of dispute between the claimant and the Ministry is as to the precise meaning of the phrase "reasonable doubt" in paragraph (4) of article 5 of the Royal Warrant. The Ministry, arguing from the fact that under article 5 the onus of establishing that his disablement is due to an injury attributable to his service is cast upon the claimant, rely on the consideration that in the absence of paragraph (4) the claimant in order to succeed would have to establish, just as a plaintiff in a civil action would have to establish, that the balance of probabilities was in his favour, with the necessary consequence that he would fail to make good his claim if the tribunal felt that there was simply an equal degree of probability as to whether or not his disablement was due to his service, just as a plaintiff in such circumstances would not be entitled to a verdict in his favour in a civil action. The Ministry contend that paragraph (4) of article 5, providing that the benefit of a reasonable doubt shall be given to the claimant, only comes into operation to assist the claimant when the evidence on behalf of the claimant and the evidence on behalf of the Ministry is equally or nearly equally balanced, and that where there is a clear preponderence of probability against the claimant there is no room for reasonable doubt. Reasonable doubt, they say, can only arise in regard to cases near the border line. In support of their contention the Ministry rely upon a paragraph in the judgment of Denning J. in *Miller v. Minister of Pensions*[1]. In expounding the position under article 4 of the previous Royal Warrant of 1943, Denning J. says[2]: "In cases falling under art. 4 (2) and art. 4 (4) "(which are generally cases where the man was fit on his discharge, "but incapacitated later by a disease) there is no compelling presumption in his favour, and the case must be decided according to the "preponderance of probability. If at the end of the case the evidence "turns the scale definitely one way or the other, the tribunal must "decide accordingly, but if the evidence is so evenly balanced that the "tribunal is unable to come to a determinate conclusion one way or "the other, then the man must be given the benefit of the doubt. This "means that the case must be decided in favour of the man unless the "evidence against him reaches the same degree of cogency as is "required to discharge a burden in a civil case. That degree is well "settled. It must carry a reasonable degree of probability, but not so "high as is required in a criminal case. If the evidence is such that the "tribunal can say: 'We think it more probable than not,' the burden "is discharged, but, if the probabilities are equal, it is not." With the

1 [1947] 2 All E.R. 372. 2 Ibid. 374.

very great respect due to everything said by Lord Denning I confess that I find great difficulty in following his exposition in *Miller's* case[1] of the effect of the provisions of paragraphs (2) and (4) of the Royal Warrant of 1943. However that may be, the present case falls to be decided under the Warrant of 1949 and I accept the explanation of the effect of paragraph (4) of article 5 of the 1949 Warrant given by Ormerod J. in *Dickinson's* case[2] and the test contained in the question submitted to the Appeal Tribunal by the Court of Session in *Ritchie's* case[3].

To practitioners of English law the expression "reasonable doubt" is a well-known and time-honoured phrase. Since the case of *R. v. White*[4], at any rate, judges have been accustomed to direct juries that in order to be justified in convicting in a criminal case they must not act on a mere balance of probabilities but must be satisfied of the accused's guilt beyond reasonable doubt. And it has become usual to instruct juries that a reasonable doubt is such a doubt as would cause them hesitation in grave and important concerns of their own, but that a mere fanciful doubt is not to be considered a reasonable doubt. Notwithstanding the criticism passed by Lord Goddard in *R. v. Summers*[5] and in *R. v. Hepworth and Fearnley*[6] upon the use of these expressions to convey the high standard of proof required in a criminal case, the phrase "beyond reasonable doubt" has constantly been used by the very highest authorities as a well recognised and accepted phrase describing this standard of proof. I need only refer to the speech of Viscount Sankey L.C. in *Woolmington v. The Director of Public Prosecutions*[7], and the speech of Viscount Simon L.C. in *Mancini v. Director of Public Prosecutions*[8]. And in *Preston-Jones v. Preston-Jones*[9] (not a criminal case) Lord Simonds, Lord Morton, and Lord MacDermott all use the phrase as one having a well established and well recognised meaning in English law. Accordingly, when the Royal Warrant comes to use a phrase of so well established a connotation in our law I think the phrase must be taken as used in order to indicate that degree or standard of proof which generations of lawyers have been accustomed to employ it as the apt phrase to describe. It seems to me therefore that I cannot accept it as having the narrow and limited meaning which the Ministry seek to ascribe to it

1 [1947] 2 All E.R. 372.
2 [1953] 1 Q.B. 228.
3 (1956) Reports of Selected War Pensions Appeals Vol. II, 951.
4 (1865) 4 F. & F. 383.
5 [1952] 1 All E.R. 1059.
6 [1955] 2 Q.B. 600.
7 [1935] A.C. 462, 481-2.
8 [1942] A.C. 1, 11-13.
9 [1951] A.C. 391.

on the basis of Denning J.'s observation in *Miller's* case[1]. Without clouding the phrase with attempted explanations or paraphrases such as were deprecated by Lord Goddard C.J. in *R. v. Summers*[2] and *R. v. Hepworth and Fearnley*[3], I think it is sufficient simply to say that in an article 5 case the Appeal Tribunal must ask itself whether upon reliable evidence a reasonable doubt, in the ordinary acceptation of that term, exists as to whether the conditions set out in paragraph (1) are fulfilled, and if the answer is in the affirmative the benefit of that reasonable doubt must be given to the claimant.

This is the course which the Appeal Tribunal took in the present case, and I think it not unimportant to observe that the tribunal had as its chairman a lawyer of experience whose carefully reasoned judgment shows the care and attention which he and his colleagues gave to the questions involved in the present appeal. The case stated by the chairman sets out that the tribunal accepted Dr. Clarke's opinion as to the proper interpretation of the series of X-ray plates and on the case generally as reliable evidence and held that upon that evidence a possibility existed that the claimant's tubercular disease originated in an infection which occurred during his service and resulted from service conditions. And the tribunal further held that this possibility constituted a doubt which was not remote or fanciful but real and substantial and that the claimant was therefore entitled by virtue of paragraph 4 of article 5 of the Royal Warrant to have recorded a finding that his pulmonary tuberculosis was attributable to service. In my view the tribunal applied the proper test, and having found that a possibility existed that the claimant's disease originated in an infection which occurred during his service and resulted from service conditions and that this possibility constituted a real and substantial doubt, they were justified in allowing the claimant's appeal. I do not leave out of sight the fact that the tribunal accepted that the expert opinions of Dr. Bhandari and of the Medical Services Division established clearly a preponderance of probability in favour of the view that the claimant's pulmonary tuberculosis originated after his service finished and was not caused by any service factor and that accordingly he would not have been entitled by virtue of paragraph (2) of article 5 of the Royal Warrant (in the absence of the assistance of paragraph (4)) to a finding that his disease was attributable to service. But I see nothing inconsistent in holding that notwithstanding the existence of a definite preponderance of probability or even a strong preponderance of probability there may also exist a

[1] [1947] 2 All E.R. 372.
[2] [1952] 1 All E.R. 1059.
[3] [1955] 2 Q.B. 600.

reasonable doubt within the meaning of paragraph (4) of article 5 of the Royal Warrant, and if there is reliable evidence which could give rise to such a doubt the decision as to whether, having heard and weighed all the evidence and arguments, the tribunal should or should not think it proper to come to the conclusion that such a doubt exists is a matter essentially for the tribunal itself and not for this court.

Coming now to the particular questions submitted by the case stated for the opinion of the court, the first question asks whether the tribunal misdirected itself in law as to the meaning and effect of paragraphs (2) and (3) of article 4 and paragraph (4) of article 5 of the Royal Warrant. As this is an article 5 case I do not think that the order of the court should contain any ruling as to the effect of article 4, and accordingly the answer to the first question will be that the tribunal did not misdirect itself as to the meaning and effect of paragraph (4) of article 5 of the Royal Warrant.

The second question asks whether the tribunal, having found that the evidence established a clear preponderance of probability in favour of the view that no service factor was a cause of the claimant's disablement, was wrong in law in deciding that the respondent was entitled to have recorded a finding that the said disablement was due to the disease which was attributable to service. This question will be answered by stating that, in view of the fact that the tribunal held that upon reliable evidence a reasonable doubt existed within the meaning of paragraph (4) of article 5 of the Royal Warrant, the tribunal was not wrong in law in deciding that the claimant was entitled to have a finding recorded that his disablement was due to a disease which was attributable to service.

The third question asks whether there was evidence before the tribunal which the tribunal was entitled to accept as reliable and upon which the tribunal was entitled to hold that a reasonable doubt existed whether the conditions set out in paragraph (1) of article 5 of the Royal Warrant were fulfilled. The question whether the evidence raising this doubt was reliable was of course really a matter for the tribunal to decide. But in view of Dr. Brice Clarke's position as a leading specialist in pulmonary tuberculosis the tribunal was clearly entitled to accept his evidence as reliable and one would have been greatly surprised if they had done otherwise. And having read the evidence in the case I am satisfied that there was sufficient material upon which the tribunal could legitimately come to the conclusion that there was a reasonable doubt, though, as I have already in-

dicated, the decision upon this material as to whether or not they should come to that conclusion was a matter entirely for the tribunal. The third question will accordingly be answered in the affirmative.

Appeal dismissed.

Solicitor for the appellant: *Chief Crown Solicitor.*

Solicitors for the respondent: *S. & R. Crymble.*

S.M.M.

IN RE ROBINSON, DECEASED[1].

Bankruptcy—Proof of debt by judgment creditor—Omission to value security—Liberty to withdraw proof and to submit another by way of amendment—Bankruptcy Amendment Act (Northern Ireland), 1929 (20 Geo. 5 c. 1), Sch. I.—R.S.C. Or. 88, r. 100.

Where a judgment creditor has failed to value his security as required by the First Schedule to the Bankruptcy Amendment Act (Northern Ireland), 1929[2], the court may, if it is satisfied that other creditors will not be prejudiced, give the judgment creditor leave to withdraw his proof of debt and to substitute another.

MOTION by a judgment creditor for leave to withdraw his proof of debt and to substitute another containing a valuation of his security.

The applicant company, Mellors, Munro & Co. Ltd., was a creditor of the estate of Robert Robinson deceased, who, trading as Robert Robinson & Co., was at the date of his death, indebted to the applicant in the sum of £1,746 9s. 0d. for goods sold and delivered. The applicant issued a writ against Kathleen Robinson as administratrix of the deceased trading as Robert Robinson & Co. and executor de son tort, and obtained and entered a judgment in default of defence for the sum due and costs making a total of £1,755 2s. 0d. The judgment was registered as a judgment mortgage against the interest of Kathleen Robinson in two sets of premises which had been owned by the deceased. The applicant company then applied for and obtained a grant of letters of administration to the estate, and thereafter an order was made to have the estate administered in bankruptcy pursuant to section 21 of the Bankruptcy Amendment Act, (Northern Ireland), 1929. For the purpose of obtaining that order a statement of affairs was filed in which the respective values of the deceased's two sets of premises had been estimated at £1,400 and £2,150. It was set out that the first was subject to a mortgage to secure a loan of £800 and the second to a mortgage to secure a loan of £500.

[1] In the Queen's Bench Division (Bankruptcy) before McVeigh J.: Dec. 16, 1958.

[2] Bankruptcy Amendment Act (Northern Ireland), 1929, Sch. 1.

"1. If a secured creditor realises "his security, he may prove for the "balance due to him, after deducting "the net amount realised.

"2. If a secured creditor sur- "renders his security to the official "assignee or trustee for the general "benefit of the creditors, he may "prove for his whole debt.

"3. If a secured creditor does not "either realise or surrender his secur- "ity, he shall, before ranking for a "dividend, state in his proof the "particulars of his security, the date "when it was given, and the value at "which he assesses it, and shall be "entitled to receive a dividend only "in respect of the balance due to him "after deducting the value so "assessed."

In due course an affidavit for proof of debt was lodged with the official assignee on behalf of the applicant company. The affidavit stated that the sum of £1,755 2s. 0d. was due on foot of a judgment mortgage and gave particulars of the premises against which it was registered, but did not contain an assessment of their value.

Murray for the applicant company.

Russell for the Official Assignee.

MCVEIGH J.: The point raised by this application is, perhaps, one of some general importance and it is undoubtedly of particular importance to the applicant, a limited company, which is a judgment creditor. It so happens that though the Company had in fact registered its judgment as a judgment mortgage, the proof of debt made on its behalf, though mentioning the judgment mortgage, is not in the form contemplated by the First Schedule to the Bankruptcy Amendment Act (Northern Ireland), 1929. Article 3 of the Schedule provides that "If a secured creditor does not either realise or surrender his security, he shall, before ranking for a dividend, state in his proof the particulars of his security, the date when it was given, and the value at which he assesses it...." Now the affidavit lodged on behalf of the creditor for proof of debt did not set out the value of the security. I am fully satisfied that this omission was due to inadvertence, but the question is whether anything can now be done to rectify the position.

The present application is for an order giving leave to withdraw the proof of debt and to substitute therefor a proof of debt containing a valuation of the security, and it is contended that the court has a discretion to make such an order by way of amendment. If there is such a discretion, no court would, of course, proceed to exercise it unless it was satisfied that other creditors would not be prejudiced. It could, admittedly, be said that the failure of this particular creditor to comply with the stipulated requirements results in a windfall to the other creditors and that they would be prejudiced by having that windfall withdrawn, but I do not think that that is the sort of prejudice which the court should take into account in deciding whether or not to exercise any discretion which it may have. It is not the sort of windfall which the other creditors would have been entitled to expect and I would not be prepared to hold that its withdrawal would result to their prejudice.

The substantial point is whether or not there is any jurisdiction to

amend. Undoubtedly the case which was cited, *Ex parte Greacen*[1], would appear to suggest that there is. The headnote in that case reads: "Where a creditor by a bona fide mistake proved for the whole "debt, omitting to value a security, the Court will allow him to with- "draw his proof, so as to enable him to value his security, if such "liberty will not injure the interest of anyone else." Whatever one may have to say about the judgment in that case it undoubtedly enunciates an equitable principle and if the decision was technically correct it should be followed. Can the decision be supported? It seems that it could in this way—at that time, in 1896, the Rules in force were the General Orders made under the Bankruptcy (Ireland) Amendment Act, 1872, and rule 85 prescribed the manner of proof of debt by secured creditors and required such creditors to state the value of their security in their proof. (A rule in identical terms appeared in the Rules of the Supreme Court (Ireland), 1899, (rule 90) and 1905, (rule 86), and article 3 of the First Schedule to the 1929 Act is substantially to the same effect.) Rule 113 of the General Orders of 1872 is in these terms: "In any proceedings the Court may allow any "amendments which in the judgment of the Court ought to be "allowed, on such terms as may be ordered." Section 124 of the 1872 Act was the section under which the General Orders were made and it provided that "any rules so made shall be deemed to be within the "powers conferred by this Act, and shall be of the same force as if "they were enacted in the body of this Act." I take that to mean that the Rules are to be read as if they were in the body of the statute and, as one can find in the Rules made under section 124 a power to allow amendment, then it would seem to be not going too far to say that rule 113 should be read as if it were written into the statute and construed along with its other terms. It may well be that the decision in *Greacen's* case[1] can be supported on those lines.

One comes on then from that stage and looks at the statutory position as it is to-day. Order 88, rule 100, of the Supreme Court Rules is identical in wording to rule 113 of the General Orders of 1872 quoted above. That in itself is a very wide power of amendment, but as the regulating of the manner of proof of debt by secured creditors is now governed, not by Rules of Court, but by the First Schedule to the 1929 Act, difficulty arises when one comes to consider whether one can apply the power in rule 100 to modify, as it were, the terms of the Act.

It is urged against the creditor that a High Court rule cannot

[1] (1897) 31 I.L.T.R. 56.

operate to modify the effect brought about by reading the Schedule to the 1929 Act as it stands. Now, as I have already indicated, there is no question of merits involved in this case, and it is so conceded, very rightly, by Mr. Russell for the Official Assignee as representing the general body of creditors. Indeed, he recognises the anomaly which exists if powers of amendment cannot be used by the court here similar to those contained in the comparable English legislation. I must say I cannot understand why there is no such power contained in the 1929 Act, but it may be that one has to look to the Rules. Section 124 of the 1872 Act provided that Bankruptcy Rules were to be of the same force as if contained in the Act and section 30 of the 1929 Act provided that that Act is to be construed as one with the earlier Bankruptcy Acts. I think that Order 88 in its present form has the same status as had the General Order dated December 20, 1872. The present Order 88 was made in 1936 in the manner indicated in section 3 (2) of the Supreme Court of Judicature Act (Ireland) (No. 2), 1897, but there is nothing, in my view, which prevents such an Order being of the same force as if enacted in the body of the Bankruptcy Acts pursuant to the provisions of section 124 of the 1872 Act. The present Order 88, it is to be noted, is made by virtue of the enactments recited in the preamble to the Order and "of all other powers enabling "in this behalf." Consequently I propose to read the power to amend into the statutory provisions and I do not consider that the terms of the 1929 Act, either in the body of the statute or in the Schedule preclude me from doing so. If it had been necessary I might have been prepared to go so far as to read section 371 of the Bankruptcy and Insolvency (Ireland) Act, 1857, in the way in which Mr. Murray has asked me to read it, namely that the proof of debt was not a proceeding which was invalidated by want of form, but that would be in the nature of a last resort. In the circumstances I do not think it necessary to consider the other arguments. The creditor, as he undertook to do, will pay the costs of the Official Assignee and the order of the court will give leave to withdraw the proof of debt and to submit another by way of amendment.

Order accordingly.

Solicitors for the applicant: *Andrew R. Fletcher & Co.*

Solicitors for the Official Assignee: *Hamill, Davison & Co.*

S.M.M.

THE HONOURABLE THE IRISH SOCIETY v. MINISTRY OF FINANCE[1].

Arbitration—Drainage works causing damage to fishery—No mistake of law on face of award except by inference—Motion to set aside award.

The owners of a several fishery which had been damaged by the execution of drainage works carried out by the Ministry of Finance in pursuance of the powers conferred by the Drainage Acts (Northern Ireland), 1929 to 1952, claimed compensation in respect of the financial loss occasioned. The claim was made in 1951 and at the hearing of the arbitration in 1956 the arbitrator applied a rental basis for assessment of compensation and took the fishing season 1950-51 as an appropriate date when the depreciation in value could be assessed. The award was challenged on the ground, inter alia, that the arbitrator was wrong in law in holding himself bound to ignore evidence regarding the conditions affecting the fishery after 1950-51.

Held, that though it was a reasonable inference that the arbitrator had mistakenly thought himself bound to ignore the evidence relating to the period after 1950-51, yet as this fact was not so stated in terms on the face of the award it could not be maintained that the arbitrator had erred in law.

MOTION to set aside the award of an arbitrator.

The Society of the Governor and Assistants London of the New Plantation in Ulster within the Realm of Ireland (more often known as the Honourable the Irish Society, and hereinafter referred to as "the Society") was the owner in fee simple of the several fishery in the River Bann. The Society leased the fishery, along with the fishing in the River Foyle, to the Foyle and Bann Fisheries Company Limited, under a lease which expired on September 29, 1950. Subsequently the Society leased the fishery in the River Bann to Mr. Arthur H. Noble under a lease for ten years from September 29, 1950.

The Ministry of Finance for Northern Ireland, by virtue of powers vested in it under the Drainage Acts (Northern Ireland), 1929 to 1952, executed certain works in the River Bann with the object of reducing flooding in the area of Lough Neagh. The drainage works were completed in 1942 and claims by the Foyle and Bann Fisheries Company Limited as lessees were paid by the Ministry in 1943 and 1955 in respect of financial loss occasioned by the works between 1937 and 1950.

The Society, as owners of the fishery, claimed compensation in 1951 from the Ministry on the ground that the drainage works and the operation of the drainage scheme had, within the meaning of

[1] In the Queen's Bench Division before Curran L.J. and Sheil J.: April 28, 29, 30; May 16, 1958.

section 11 of the Drainage Act (Northern Ireland), 1929, caused depreciation in the value of the fishery in the River Bann and the following questions were submitted to an arbitrator:

"(1) Have the aforesaid works" (i.e. drainage works carried out by the Ministry during the years 1930 to 1942) "or any of them caused "any depreciation, past, present or future, in the value of the Society's "Several Fishery?

"(2) If so,

"(a) on what basis should the compensation be ascertained?

"(b) what is the amount of the compensation?"

At the hearing of the arbitration in 1956 the arbitrator found that the drainage works, resulting in the destruction of spawning beds and a change in the regime of the river, had caused a depreciation in the value of the fishings, and the further portions of his award relevant to this appeal are set out as follows:

"15. The basis of" (the Society's) "claim, although this was amended "in details at the hearing, is as follows:

"(1) The average annual catch of salmon and grilse during the "period 1922 to 1931, being the ten years before the Bann Drainage "Works, is given at 115,367 lbs. From this is deducted 10% to "provide for the general decline in salmon fisheries since 1950, "leaving a figure of 103,831 lbs.

"(2) The average annual catch for the years 1946 to 1955 is "72,942 lbs., shewing an annual deficiency of 30,889 lbs.

"(3) To this deficiency is applied the relative market price per "pound for salmon and grilse, less marketing post-1950, being 7s. 3½d. "and 5s. 2d. per pound respectively, resulting in an annual loss of "£11,922.

"(4) From this figure of £11,922 is deducted £1,000 to provide for "the additional rates which would be payable, if the annual average "catch for the period 1922 to 1931 had been maintained, leaving a "figure of £10,922.

"(5) This annual loss of £10,922 is capitalised at 7%, being 14 "years' purchase, resulting in a figure of £156,028 which, added to "an angling loss of £4,000, resulted in a grand total of £160,028, "which was the amount claimed in the submission. Adjustments were "made on the claim in the course of the hearing, whereby the total "amount claimed was reduced to £147,371, but the basis of the claim "remained the same.

"16. The main question arising for determination on the claim is the "proper basis of assessment of compensation to the Society for "depreciation in the value of the fishery." [Here the arbitrator set out section 11 of the Drainage Act (Northern Ireland), 1929.]

"17. The question, therefore, which I have to determine is what is "the depreciation in value of the fishings caused by the drainage "works. The basis of compensation proposed by the Society and "spoken to in evidence is a capitalisation of the loss of profits which "the Society would have sustained if they had operated the fishery "themselves. A question arose in the course of the hearing as to "whether compensation was to be assessed under the Acquisition "of Land (Assessment of Compensation) Act, 1919. There is, in my "view, some force in the argument that by the concluding words of "paragraph 9 of the submission, section 9 of the Drainage Act "(Northern Ireland), 1929, which incorporates the provisions of the "1919 Act, has been imported into the arbitration, but I am prepared "to assume, for the purposes of my decision, that compensation is to "be assessed upon the basis of section 11 alone. On a proper appli- "cation of the terms of this section, the depreciation in the value of "the fishery must, in my view, be ascertained by comparing the value "of the fishery before the drainage works were executed with the "value after the execution of these works. The difference between "these two values will be the extent to which the value of the fishery "has been depreciated by the drainage works. In my view, the value "of the fishery in the pre-drainage period and in the post-drainage "period is the amount which the subjects might be expected to "realise at the relevant times in the open market in a sale between a "willing buyer and a willing seller.

"18. The Society's basis of calculating the value of the fishery upon "the basis of the profits which might have been made by them in "operating the fishing is, in my view, erroneous. This approach to the "question appears to have a basic unreality in respect that the "Society have never operated the fishery themselves. The Society is "not entitled, under section 11 of the 1929 Act, to compensation for "the loss of profit occasioned by the drainage works, but only for the "depreciation in the value of the heritable subject owned by them: "*Metropolitan Board of Works v. Howard*[1]; *George Wimpey & Co. "Ltd. v. Middlesex County Council*[2]. No doubt the profits which "might be made in the use of the land are one of the factors to be "taken into account in estimating the value of the subject; *Pastoral*

[1] (1889) 5 T.L.R. 732.

[2] [1938] 3 All E.R. 781.

"*Finance Association Ltd. v. The Minister*[1]. But I reject the Society's "contention that the proper method of calculating the compensation "is on the basis of the loss of profits occasioned by the drainage works.

"19. The method of estimating the compensation payable put for- "ward by the Ministry was the rental value basis. This method was to "endeavour to ascertain what would have been the rental value of the "fishery before the execution of the drainage works; next to en- "deavour to ascertain what would have been the rental value of the "fishery after the damage occasioned by the drainage works, and the "difference between these two sums was capitalised at a number of "years purchase, and the result was said to represent the depreciation "in the value of the fishery due to the drainage works. As a method "of approach to the problem, I approve of it. This method aims at "ascertaining the value of the fishery as distinct from the value of the "business of conducting the fishery by the Society. It is the former "value which I have to estimate in arriving at a figure for the de- "preciation in value of the fishery.

"20. Mr. McMullan, whose evidence impressed me by its clarity and "fairness, produced a calculation from which he arrived at a difference "in rental value of £1,220. The rental value, as unaffected by drainage, "was estimated at £4,900, and the affected rental value at £3,682. "I was not wholly satisfied with the details of this calculation, and I "am not prepared to adopt it in its entirety as the method of ascer- "taining compensation.

"21. It is necessary at this stage to decide at what period the com- "pensation must be assessed. The Society, in presenting their claim, "suggested that matters should be viewed as at the present date. "Reference was made to *Bwllfa and Merthyr Dare Steam Collieries* "(1891) *Ltd. v. Pontypridd Waterworks Co.*[2] and it was argued that the "arbitrator was entitled to take into account circumstances obtaining "at the date of the hearing. But, in my view the circumstances of the "present claim are different. In *Bwllfa*[2] the inquiry was not into the "value of the coalfield, but into the loss of profits which would have "been made by the colliery company. Where land is taken com- "pulsorily, the date of the claim is the date when the compensation "falls to be assessed: *Huckle v. Lowestoft Corporation*[3]. It would, in "my view, be anomalous if the basis of the claim was to be altered "according to the delay which might occur between the presentation

1 [1914] A.C. 1083.
2 [1903] A.C. 426.
3 [1942] 2 All E.R. 688.

"of the claim and the hearing of the arbitration. The date when the "claim was first formulated by the Society was June 26, 1951, and the "year 1950-51 forms a convenient date when the depreciation in "value can be assessed. The lease to the Foyle and Bann Fisheries "Company, Ltd., expired on September 29, 1950. By 1950 the river "had settled down sufficiently to a lower level of production to enable "an estimate to be made of the damage caused by the drainage "operations. For these reasons, I consider that the appropriate date "to strike the balance is the year 1950-51. The Society will be ade- "quately compensated for any delay in payment of compensation by "the award of interest which I propose to make."

The arbitrator then went on to find that the fishery had been let in September 1950 for ten years at a rent of £3,250; that of the proved decline of 44% in the catch of salmon and grilse, 20% was attributable to natural causes, and that, therefore, the sum of £1,390 would represent the loss of rental value. To this figure he added 20% in respect of the fact that the Bann had, as a result of the drainage works, changed from a predominantly salmon river to a predominantly grilse river, and on the basis of fifteen years purchase, capitalised the loss at £25,000, and directed that that sum, together with interest at 5% from September 29, 1950, be paid by the Ministry to the Society.

The Society moved that the award be set aside or, alternatively, that it be set aside in so far as it measured the compensation at £25,000 on the grounds that the award was bad on its face and on its face disclosed errors of law; that it was, on its face, self contradictory and inconsistent; that the arbitrator failed to take into account matters which he should have taken into account; that he misdirected himself in law and mis-applied the facts on which he based the award; and that the award was incomplete in so far as it failed to decide whether the works caused past, present or future depreciation of the fishery.

Nicholson Q.C., *Jones Q.C.*, *Wilkinson* and *Babington* for the applicant. The award contains a number of errors in the calculation of the compensation for damage to this fishery but the main burden of complaint is that the arbitrator treated the case as though it were one of acquisition of land, basing his award on the difference between the rental values before and after drainage and ignoring all the information available after 1950. He took the view that he was not entitled in law to look beyond that date for the purpose of assessing compensation. That is the main vice of the award. There are certain other manifest errors, but to ignore conditions after 1950, especially

in view of the fact that the price of salmon was controlled up to that date, was clearly wrong and affords sufficient justification in itself for the setting aside of this award.

The arbitrator, in basing his award on the rental value, lost sight of the fact that the Society were fee simple owners and failed to have any regard to the reversionary value of the fishery. The award should have been based on the diminution in the value of the catch. The arbitrator failed to take into account the evidence which went to show what the value of this fishery would have been if the drainage works had not been executed. He also erroneously held that the Society suggested fourteen years as a multiplier when in fact that figure was suggested by the Society if, and only if, the assessment was to be based on the loss of profits.

The facts showed a fall in the numbers of fish and a change in the character of the river i.e. the salmon/grilse ratio. It is, of course, a difficult thing to assess compensation in this type of case but it was always clear to the parties that time would have to pass before the value of the claim could be ascertained and yet, the necessary time for the gathering of information having elapsed, the arbitrator took the view that he must disregard all the evidence on the position subsequent to 1950.

Apart from the provisions of the Arbitration Act, 1937, the court has power at common law to set aside the award of an arbitrator for error of law appearing on its face. The principles are set out in Halsbury's Laws of England, 3rd ed., vol. 2 at p. 55 et seq. The error in law in this case was the decision to exclude evidence by taking 1950 as the date at which compensation was to be assessed and that error appears on the face of the award at paragraph 21. The authorities show that if the error in the award relates to a question of law specifically referred as such to the arbitrator, the court will not interfere, but in this case the question submitted to the arbitrator was a mixed question of law and fact. It may be, though it is not conceded, that the rental basis is something which cannot be challenged. The clearest statement of the law is to be found in *Absalom Ltd. v. Gt. Western (London) Garden Village Society, Ltd.*[1].

In the present case it was essential for the arbitrator to keep in mind the nature of the claim. What he was asked to do in effect was to redeem a series of actions for a legalised nuisance. If the Drainage Act (Northern Ireland), 1929, had not been passed, the Society could

[1] [1933] A.C. 592.

have brought action after action, year after year, in respect of this kind of damage. The arbitrator erroneously applied a principle applicable to the acquisition of land subject to a notice to treat at an arbitrary date, and rejected the principle applicable to a continuing and increasing loss or depreciation. It appears in terms on the award that he took his stand at 1950 and the manner in which he contrasts *Bwllfa and Merthyr Dare Steam Collieries* (1891) *Ltd. v. Pontypridd Waterworks Co.*[1] and *Huckle v. Lowestoft Corporation*[2] in paragraph 21 of the award shows that he considered himself bound in law to leave out of account evidence of the position after that date.

Harrison Q.C., *Lowry Q.C.* and *Rowland* for the Ministry. The central part of this case is whether or not there has been an error of law in this award and in particular in paragraph 21 read in its context. The first consideration is the general principle to be applied in attacking the award of an arbitrator. Where the parties choose an arbitrator to be the judge of the disputes between them, they cannot, when the award is good on its face, object to his decision either upon the law or upon the facts. If authority is needed for that proposition it is to be found in *Attorney-General for Manitoba v. Kelly*[3].

The expression "error of law on the face of the award" means that it must contain some legal proposition which is erroneous: see Halsbury's Laws of England, 3rd ed. vol. 2, at p. 60 and *Champsey Bhara & Co. v. Jivraj Balloo Spinning and Weaving Co.*[4]. In deciding whether the award of an arbitrator should be remitted or set aside on the ground that there is an error of law appearing on its face the court is not entitled to draw any inference as to the finding by the arbitrator of facts supporting the award, but must take it at its face value: *James Clark (Brush Materials) Ltd. v. Carters (Merchants) Ltd.*[5].

Coming, then, to the award and the argument that it ignored the position after 1950, it is submitted that the arbitrator was quite entitled to choose any date from which to take his standard of fair compensation. The arbitrator has indicated that in choosing that date he had regard to *Huckle v. Lowestoft Corporation*[2] but it cannot be inferred therefrom that he must be taken to have ignored the evidence of conditions after 1950. In that case it was held that compensation was to be assessed as at the date when the claim was made but it was also held that the arbitrator was entitled to take into account a matter

1 [1903] A.C. 426.
2 [1942] 2 All E.R. 688.
3 [1922] 1 A.C. 268, 281.
4 [1923] A.C. 480.
5 [1944] 1. K.B. 566.

affecting a period after that date, i.e. the fact that the war was likely to continue for some considerable time.

Nicholson Q.C. in reply. The basis of the award was that circumstances obtaining at the date of the hearing could not be taken into account, following *Huckle v. Lowestoft Corporation*[1] and rejecting opposite view established by *Bwllfa and Merthyr Dare Steam Collieries* (1891), *Ltd. v. Pontypridd Waterworks Co.*[2]. This application of the principle of *Huckle's* case[1] and rejection of the principle of the *Bwllfa* case[2] appears in plain terms on the face of the award where the arbitrator says at paragraph 21: "It is necessary at this "stage to decide at what period the compensation must be assessed. "The Society, in presenting their claim, suggested that matters should "be viewed as at the present date. Reference was made to *Bwllfa and* "*Merthyr Dare Steam Collieries* (1891), *Ltd. v. Pontypridd Water-* "*works Co.*[2] and it was argued that the arbitrator was entitled to take "into account circumstances obtaining at the date of the hearing. "But, in my view the circumstances of the present claim are different. "In *Bwllfa*[2] the inquiry was not into the value of the coalfield, but "into the loss of profits which would have been made by the colliery "company. Where land is taken compulsorily, the date of the claim is "the date when compensation falls to be assessed: *Huckle v. Lowes-* "*toft Corporation*[1]."

The condition for setting the award aside stated by Lord Dunedin in *Champsey Bhara & Co. v. Jivraj Balloo Spinning and Weaving Co.*[3], "some legal proposition which is the basis of the award and which "you can say is erroneous" is thus fulfilled.

There is no necessity to draw any inference and the principle in *James Clark (Brush Materials), Ltd. v. Carters (Merchants), Ltd.*[4], which is not challenged, is inapplicable. It is not a matter of drawing an inference because no other meaning can be found in the words cited from the award than a deliberate rejection of the *Bwllfa* case[2] and an application of *Huckle's* case[1]. The only question is whether this is a case within the principle of the *Bwllfa* case[2] or within the principle of *Huckle's* case[1]. This is a pure question of law and admits of only one answer.

Cur. adv. vult.

1 [1942] 2 All E.R. 688.
2 [1903] A.C. 426.
3 [1923] A.C. 480, 487.
4 [1944] 1 K.B. 566.

CURRAN L.J.: When this matter came before the learned arbitrator the main issues between the parties were:

1. Whether compensation should be assessed on a rental basis or on a loss of profits basis.
2. The amount of compensation.

As to the basis of compensation; the learned arbitrator decided that the rental basis should be adopted. It is clear that in so deciding he did not misdirect himself on a question of law. It is in his application of that basis that the Society contend the learned arbitrator misdirected himself. What he had to do was to arrive at an amount which represented the difference between the rent obtainable for the fishery in its damaged state and the rent obtainable for the fishery in its undamaged state. This would show the annual loss to the Society by reason of the damage caused by the drainage works. It was then for the arbitrator to determine by what figure the amount so ascertained should be multiplied in order to arrive at the amount of compensation payable. The learned arbitrator proceeded to find an appropriate date which fairly represented the state of the fishery on the completion of the drainage works—a date at which one could reasonably say: "The works have been completed, the present state "of the river enables one to form a reliable picture of the fishery in "its damaged state (taking into account not only the loss in catch but "also the fact that a greater proportion of the catch is now grilse, a "cheaper fish than salmon, whereas before the works were carried "out a greater proportion of the catch was salmon)." The date taken by the learned arbitrator was the year 1950-51. It is again clear, in my view, that the arbitrator was amply justified in taking this date for the reasons he has given. The question is, to what extent he should have tied himself to that date. What he has done is to assume a purchaser in 1950-51 with a knowledge of the fishery as at that date, including knowledge of a change in the river from salmon to grilse. If the learned arbitrator was of opinion that after 1960 there would be no material variation in his assessed loss of rental value this seems to me, if I may respectfully say so, a fair and reasonable assumption to make. In fact, if I am right in my understanding of what the learned arbitrator has done, his allowance of an additional 20% of loss to represent the change in regime of the river is generous, so far as the years 1950-1960 are concerned, and for this reason: if it be assumed that in agreeing to pay £3,250 rent for 10 years Mr. Noble took into account the change in the regime of the river and that a price differential would follow decontrol, then the loss for which the

arbitrator has added 20% would already have been taken care of by Mr. Noble agreeing to pay a smaller rent than he would have been prepared to pay if this differential in price were not taken into account. In my view it is clear that in assessing a *rent* in 1950-51 for the undamaged fishery the learned arbitrator was bound to assume a hypothetical lessee in the year 1950-51. What he was seeking to assess was the rent that a lessee *in that year* would have paid. Having assessed that rent, the learned arbitrator found that there was a loss in rental value *as at 1950-51* of £1,670 per annum. In my view this figure cannot be challenged and must hold good as representing the annual loss suffered by the Society from 1950 to 1960. Much has been said, and indeed it is the net issue, about the learned arbitrator refusing to take into account the rise in price of salmon and grilse following decontrol, and in particular the prices obtaining in 1956 when the arbitration was held. In my opinion the variation in price (whether up or down) between 1950 and 1960 is not relevant in ascertaining loss of *rental value* up to 1960. Whatever loss per annum the Society suffered during that period was fixed when they granted the lease of the fishery to Mr. Noble in 1950. It is Mr. Noble who would lose or gain by variations in price during the 1950-1960 period. But when Mr. Noble's lease terminates, the rent then obtainable may be affected, up or down, by prices then prevailing, the trend of prices up to that date, and the future trend of prices anticipated from that date. The learned arbitrator has accepted the assessed rental loss for 1950-51 as being the proper measure of the annual rental loss not only up to 1960, but also thereafter. This is not, as I understand it, on the basis that he has attempted to assess what will be the rental loss when a letting is made in 1960, but on the basis that, having taken 1950-51 as the date at which to assess the compensation, he must assume a purchaser at that date, and cannot allow for any possible future variation in the loss of rental value. As the learned arbitrator himself said at page 53 of the transcript: "If you have suffered loss of "profits you are justified in basing them on present-day prices. "I cannot see how a purchaser, when the drainage works are com- "pleted, could have known what the price was going to be." This was said in spite of the fact that Mr. Harrison had, in my view very properly, made a concession on the point by saying, at page 336 of the transcript: "The fact that for 5 years there has been an improve- "ment in the price of salmon is something which I am conceding you "are entitled to look at, even if you stand at 1950: at that time it "meant looking in the crystal ball. You hear this matter in 1956: it

"would be wholly unrealistic to ask you to exclude it altogether. "I think you are entitled to include that, just as I think you should be "entitled to include the possibility, or the probability, whichever you "rate it at, that salmon is now at an all time peak, according to their "evidence, and that all time peaks are succeeded by recession...."

I fully appreciate the difficulty of the task the parties submitted to the learned arbitrator. They asked him in the fourth schedule to the submission, to assess compensation for any past present or future depreciation in the value of the Society's several fishery. The loss of rental value assessed by the learned arbitrator covers the past and the present, and the future up to 1960; but I can find nothing in the transcript, or in the award, to indicate that the learned arbitrator has himself, with all his 1956 knowledge, endeavoured to look into the future beyond that date. He has merely looked into the future with the knowledge of an assumed 1950-51 purchaser. If the learned arbitrator in so restricting himself did so because he was of opinion that he was bound to do so as a matter of law, *and if he so held on the face of the award*, the final question for determination would be, was he right in so holding? As at present advised my opinion is that such a finding would be erroneous, particularly having regard to the terms on which the matter was submitted to the learned arbitrator. I must confess that I am inclined to draw an inference from what I have seen in the transcript and in the award that the learned arbitrator was of opinion that he was bound in law to restrict himself to the knowledge of an assumed purchaser in 1950-51 once he had decided, as he was entitled to do, that he should find what was the loss in rental value at that date. But Mr. Harrison has referred us to the judgment of Tucker J. in *James Clark (Brush Materials) Ltd. v. Carters (Merchants) Ltd.*[1] where he says: "I do not think, however, that I am entitled to "draw any inference. In my view I must look at the document to see "if it says that the award is based on this finding alone. If it does not so "state, it appears to me to be impossible for me to draw any inference, "one way or the other." I respectfully agree with that proposition. I must therefore look at the award itself to find whether it contains, to use the words of Lord Dunedin in *Champsey Bhara & Co. v. Jivraj Balloo Spinning & Weaving Co.*[2], "some legal proposition which is "the basis of the award and which you can then say is erroneous." Counsel for the Society contend that such a proposition is found in para. 21 of the award. The learned arbitrator's marginal note entitled this paragraph "Date for assessment of compensation." The para-

[1] [1944] 1 K.B. 566, 569. [2] [1923] A.C. 480, 487.

graph itself is as follows: "21. It is necessary at this stage to decide at "what period the compensation must be assessed. The Society, in "presenting their claim, suggested that matters should be viewed as at "the present date. Reference was made to *Bwllfa and Merthyr Dare "Steam Collieries* (1891) *Ltd. v. Pontypridd Waterworks Co.*[1], and it "was argued that the arbitrator was entitled to take into account "circumstances obtaining at the date of the hearing. But, in my view, "the circumstances of the present claim are different. In *Bwllfa*[1] the "inquiry was not into the value of the coalfield, but into the loss of "profits which would have been made by the colliery company. Where "land is taken compulsorily, the date of the claim is the date when "the compensation falls to be assessed: *Huckle v. Lowestoft Cor- "poration*[2]. It would, in my view, be anomalous if the basis of the "claim was to be altered according to the delay which might occur "between the presentation of the claim and the hearing of the "arbitration. The date when the claim was first formulated by the "Society was June 26, 1951, and the year 1950-51 forms a convenient "date when the depreciation in value can be assessed. The lease to the "Foyle and Bann Fisheries Company Limited expired on September "29, 1950. By 1950 the river had settled down sufficiently to a lower "level of production to enable an estimate to be made of the damage "caused by the drainage operations. For these reasons, I consider "that the appropriate date to strike the balance is the year 1950-51. "The Society will be adequately compensated for any delay in pay- "ment of compensation by the award of interest which I propose to "make."

I have had to study this paragraph very carefully to ascertain its true import. Whatever the learned arbitrator may have intended to convey by his references to the two cases and to the date of assessment of compensation in the case of compulsory purchase of land, the conclusion he arrives at is that a convenient date when the depreciation in value can be assessed is the year 1950-51, and that that is the appropriate date to strike the balance between the pre-damage and post-damage condition of the fishery. As I have already indicated, my opinion is that in selecting 1950-51 as an appropriate date the learned arbitrator was not in error. Where the learned arbitrator erred, if he erred at all, was in not taking into account the increased price of salmon up to 1956 when considering the position after 1960. In fact it does not appear that he gave specific con-

1 [1903] A.C. 426.

2 [1942] 2 All E.R. 688.

sideration to the post 1960 position. It would appear that he has based the compensation on a continuance of the 1950-51 loss in rental value. He was entitled to do so if he considered that after 1960 there would be no material variation in rental value. Did he do so because he held, and did he so hold on the face of the award, that he was bound in law so to do? The award does not expressly say so, and, in fact, does not refer to the matter at all, unless one proceeds to do what I have held one is not entitled to do, draw inferences from what has been said in paragraph 21 of the award.

In these circumstances I am of opinion that the Society has not shown that the award has been based on an error of law appearing on its face. I would, accordingly, dismiss the motion.

SHEIL J.: I agree with the conclusion of my Lord that this application must fail.

The central point of the Society's argument is that if one looks at that part of paragraph 21 of the award which contrasts *Bwllfa and Merthyr Dare Steam Collieries* (1891) *Ltd. v. Pontypridd Waterworks Co.*[1] and *Huckle v. Lowestoft Corporation*[2] it is patent that the learned arbitrator was wrong in law. It might well be that if that particular passage were to be considered in isolation it could be successfully contended that there was an error in law on the face of the award as defined by Lord Dunedin in *Champsey Bhara & Co. v. Jivraj Balloo Spinning and Weaving Co.*[3], but one must look at the whole of the paragraph, including the marginal note, and, so read, it does not support that view. Such phrases in the paragraph itself as "a convenient date" and "an appropriate date" negative the allegation that the learned arbitrator had bound himself to and by an erroneous proposition which was the basis of the award.

An award must be taken as it stands, the whole award read as a whole. When so read there is no error in law on the face of the document which is the basis of the award, and it is on this net point that I am content to rest my judgment. As my Lord has pointed out, it is not for us to speculate or draw inferences.

Application refused.

Solicitors for the applicants: *Dickson & McNulty.*

Solicitor for the respondent: *F. C. MacNeice.*

S.M.M.

1 [1903] A.C. 426.
2 [1942] 2 All E.R. 688.
3 [1923] A.C. 480, 487.

McAVOY v. DOWN COUNTY COUNCIL[1]

Criminal Injury—Malicious damage to trees—Trees cultivated for the purpose of producing timber—Whether trees a "growing crop"—Criminal Injuries Act (Northern Ireland), 1956 (5 Eliz. 2 c. 19), s. 2.

Section 2 of the Criminal Injuries Act (Northern Ireland), 1956, provides that compensation may be obtained under that Act where damage has been maliciously or wantonly caused to "any fruit trees or growing crops."

Held, that larch trees being grown systematically for the purpose of producing timber constituted a "growing crop" for the purpose of this provision.

Appeal to the Judge of Assize from a decree of the County Court Judge of Down.

The respondent had planted on his agricultural holding a number of larch trees and these he cultivated with the intention of cutting and selling them as timber about 25 or 30 years after planting. Some of these trees were maliciously damaged by fire and the respondent claimed compensation under the provisions of the Criminal Injuries Act (Northern Ireland), 1956.

The county court judge gave a decree awarding £60 compensation, and the County Council appealed, contending that the trees in question were not a subject for compensation under the Act of 1956.

Moody for the County Council.

O'Donnell for the respondent.

The arguments of counsel appear sufficiently in the judgment.

Cur. adv. vult.

Black L.J.: This case arises out of the destruction by fire of a number of larch trees which were growing on the premises of the applicant situate at Carrickmacstay, Newry, Co. Down. The case was heard by the learned County Court Judge of Down, who made a decree in favour of the applicant for £60, and the County Council has appealed against his decision.

It was agreed at the hearing before me that the only provision under which the applicant could be entitled to compensation in the circumstances of this case was section 2 of the Criminal Injuries Act (Northern Ireland), 1956, and that the relevant provisions of that section were these:

[1] Before Black L.J. sitting as Judge of Assize: June 2, July 21, 1958.

"Where damage, the aggregate amount of which exceeds twenty "pounds, has been maliciously or wantonly caused to....

"(b) any of the following kinds of property, found present or "growing on, or unlawfully removed from any land which is "agricultural land within the meaning of the Agriculture Act "(Northern Ireland), 1949,....that is to say—

".....

"(iii) any fruit trees or growing crops....

"the person suffering that damage may....obtain compensation "therefor....under this Act."

The trees in question were not fruit trees, but it is claimed by the applicant that the trees themselves were a "growing crop" within the meaning of the section.

What the applicant said in evidence was that he had a farm near Warrenpoint comprising about six acres, and that he had one acre of the farm planted with larch trees and Scotch firs; he had planted 1,000 of these in 1939, but a number of them had not done well and were removed, and in 1946 he had planted a further 500 Japanese larches; he knew that there were subsidies to be had for growing other crops, but he found trees handier; he had planted the trees as an investment, and had used cuttings from the trees to make paling posts for the farm. He then described the course of husbandry of the trees, which involves thinning out and the cutting of the lower branches, and said that he intended to sell the timber when it matured, and that that would be between 25 and 30 years after planting.

The evidence of the applicant was not contradicted and it was agreed that the applicant's land is within the category of land referred to, agricultural land within the Act of 1949, and the sole question is whether these trees can be properly described as "growing crops." In other words, one must discover what the term "growing crops" means for the purpose of the Act of 1956.

The first thing which presents itself to one's mind when the word "crop" is used is a cereal or agricultural crop, whether it be one grown for food, such as corn or potatoes or turnips, or an agricultural crop not grown for food, such as flax or hemp or cotton. Those are the kinds of thing one naturally thinks of, and if this phrase had occurred in a statute of 100 or 150 years ago, I think I would have regarded it as meaning something of that sort. Mr. O'Donnell, however, contends on behalf of the applicant that at the present day the growing of trees and the art of forestry have developed to such an extent that trees are planted for the purpose of producing

timber, and are treated systematically as a crop to be cut at a definite future time, just as cereals or other crops are, and that they are therefore a "growing crop." At first sight this sounds to be a strong proposition, but when one thinks of the meaning of "crop" it is hard to find a distinction between the systematic growing of trees for timber and the systematic growing of corn or potatoes; each is sown or planted and cultivated with the intention that it should be harvested in the future. Ordinary crops come to maturity and are harvested in the course of a single year but some are planted one year for harvesting the following year, and it may be that in other countries there may be crops which are not harvested for two, three or five years, and it would be hard to say on that account that they were not crops. Where is the line to be drawn? Mr. O'Donnell contends that although these trees may not be cut for fifteen or twenty years, the mere space of time does not take them out of the category of growing crops, which are sown or planted for the purpose of being harvested in due course, and that there is no logical distinction which would warrant the exclusion of trees from the expression "growing crops" when it is found in a statute of 1956.

I should perhaps advert now to one of the arguments advanced by Mr. Moody on behalf of the Council; this argument was that the whole phrase "fruit trees or growing crops" should be looked at and that the reference to fruit trees implied that no other trees were intended to be included. The answer, however, to that argument is that fruit trees are not crops, for it is the fruit borne which is the crop, and what is contended in the present case is that the trees are in themselves a crop.

These are the arguments, and I have to make up my mind, in construing this statute of 1956, whether the systematic cultivation of trees has progressed to such an extent that in ordinary parlance the expression "growing crops" when used by educated persons can extend to include trees planted and treated systematically in this way. There is not much assistance to be derived from the legal authorities on this matter, but in a case of this sort one is entitled to look at recognised authorities on English usage, and I have consulted the Encyclopedia Britannica, 1950 edition, volume 6, at page 748, to see what is described there under the heading "Crops." It is there stated that "Crops are the grain, fruit, roots, leaves, stems, trunks, juices or "flowers of plants that become of sufficient importance to man so "that he protects, cultivates or harvests them systematically. These "products of plant growth may be used as food for man or livestock,

"as raw materials to be processed into a wide range of commercial "articles or as satisfactions of aesthetic tastes. Grasses grazed by wild "animals at large are not crops, but the same grasses, fenced or other- "wise protected by man for his domesticated animals, may be con- "sidered a crop. Trees or other plant growths cut haphazardly from "unprotected forests are not crops, but the same species systematic- "ally harvested in planned wood lots and forest reserves are crops." In volume 9 of the same edition, at page 506, under the title "Forestry," one reads this: "Like agriculture, forestry is concerned in the use of "the soil for crop production. As the agriculturist is engaged in the "production of *food crops*, so the forester is engaged in the production "of *wood crops*, and finally both are carrying on their art for the "practical purpose of revenue." Thus we find in a modern encyclo- pedia two articles which refer to trees planted and cultivated system- atically as crops, and not only in this edition, for the earlier (11th) edition of the Encyclopedia Britannica in 1910 contained the follow- ing, at page 657 of volume 10: "At present the intelligent harvesting "of timber with a view to successive crops, which is forestry, is much "more common than is usually supposed. .... It was begun among "lumbermen by the late E. S. Coe, of Bangor, Maine, who made a "practice of restricting the cut of spruce from his forests to trees 10, "12 or sometimes even 14 in. in diameter with the result that the land "yielded, during his life a second crop as plentiful as the first. .... "Systematic forestry on a large scale among lumbermen was begun in "the Adirondacks during the summer of 1898. .... The treatment is "a form of the selection system. Under it a second crop of equal "yield would be ripe for the axe in thirty-five years." Thus we find even half a century ago a book of authority using the term "crop" in relation to trees when systematically cultivated.

These are the lay authorities, but has this usage passed into the language of the courts? Mr. O'Donnell referred me to one case, *Kauri Timber Co. Ltd. v. Commissioner of Taxes*[1], in which Lord Shaw of Dunfermline refers to timber as "a crop requiring long- "continued possession of land." This is not, however, of any great assistance, as Lord Shaw was referring in that case to the cutting of trees in a forest and not to the systematic growing of trees, but in a Scottish case in the Court of Session in 1950 I find some phrases which do afford some little assistance. That case is *I.R.C. v. Williamson Brothers*[2], in which Lord Carmont says: "On the other hand, "felled trees on the site seem an obvious but long-deferred harvest."

[1] [1913] A.C. 771, 779.

[2] [1950] S.C. 391, 398.

Lord Carmont does not use the word "crop," but the words which he does use are words appropriate to convey the idea of a crop, and Lord Keith, in the same case says[1]: "In the case before us the "respondents have acquired land on which there is a growing crop of "trees for the purpose of using the same in their business as timber "merchants and saw millers." Lord Keith uses there in relation to trees precisely the same phrase which occurs in the Act of 1956, and in the same case Lord Cooper says[2]: "The occupier of woodlands "may delegate the function of reaping and marketing the crop by "selling the standing timber and authorising the buyer to fell and "remove the trees." Thus, we find all three of the learned judges in that case use language suggesting that the word "crop" is applicable to trees systematically grown for cutting as timber, and Lord Keith uses the term "growing crop."

That was a Scottish case, and I have not been able to find any precisely parallel use of the word "crop" in the English reports, apart from the *Kauri Timber Co.* case[3] (an appeal to the Privy Council from New Zealand) to which I have referred, but the same idea, without the use of the word, is conveyed by Singleton J. in the case of *Elmes v. Trembath*[4], where he says: "You have a sale of willows "planted by the owner of the farm himself some 10 or 12 years ago, "which willows occupied a part of the farm and which were planted, "I imagine, by the farmer in order that the farmer could at some "subsequent date cut them and reap the benefit of them. To my mind "that is just as much a profit or gain accruing from the occupation of "land as is the case of the farmer or market gardener who, as I "indicated in the argument, has a field of rhubarb, or a farmer or "experienced agriculturist who thinks it right to cultivate mush-"rooms." There, Singleton J., though he does not use the word "crop," seems to have the same idea in his mind in relation to trees planted in order to be cut at some future date, and that idea is clearly very near to what in ordinary parlance would be understood by a "crop."

Whether the Legislature ever contemplated the possibility that trees might come within the category of "growing crops" in the way that has been suggested here I cannot say, for I can only go by the words which have been used, but I think that, on the basis of the use of the word "crop" in standard works of authority and by the Scottish Court of Session, and of the idea conveyed by Singleton J. in the

1 [1950] S.C. at 400.
2 Ibid. 404.
3 [1913] A.C. 771.
4 (1934) 19 T.C. 72, 76.

passage I have quoted, the words used in the Act of 1956 are wide enough to entitle the applicant in this case to recover compensation, however strange it may appear at first sight, and whether or not this result was ever adverted to or intended by the Legislature. I can see no logical distinction between trees treated systematically in this way and any other crop, such as those I have mentioned, or a crop such as sisal, which may be somewhat closer to this case.

Doing the best I can, I have come to the conclusion that the decree in this case should be affirmed with costs.

Appeal dismissed.

Decree affirmed.

Solicitor for the County Council: *W. A. F. Martin.*

Solicitor for the respondent: *P. G. Curran.*

J.P.

BANGOR BOROUGH COUNCIL v. GOLDSTEIN[1].

Public health—Licence for public entertainment—Amusement arcade open to the public—Automatic gramophone operated by members of the public inserting coins—Room used for public music—Local Government Act (Northern Ireland), 1934 (24 & 25 *Geo.* 5, *c.* 22), *s.* 31.

The appellant kept a large room containing about 70 slot machines of various kinds, a shooting gallery and other amusements, and also an automatic gramophone or "juke box" which could be operated by inserting coins and depressing buttons to select the records to be played. Members of the public were invited to come in and no charge was made for admission. The "juke box" was available for operation some 12 hours each day and during this time it was operated frequently by members of the public, but not by the appellant nor by his servants. While the "juke box" was in operation the music could be heard throughout the premises, and to some extent in the street outside.

The appellant was convicted of keeping a room for public entertainment, to wit, music, without a licence for the purpose having been first obtained, contrary to section 31 of the Local Government Act (Northern Ireland), 1934.

Held, that although the room contained a number of machines other than the "juke box," each constituted a distinct and separate entertainment, and that the "juke box" was in no way subsidiary to the other forms of entertainment, and that accordingly the appellant had kept a room for public music.

Brearley v. Morley [1899] 2 Q.B. 121 considered.

CASE STATED by the Resident Magistrate sitting at Bangor Petty Sessions.

On September 18, 1957, the Borough Council of Bangor charged the defendant and appellant, Frank Goldstein, upon a summons which alleged that he did on July 17, 1957, in Winter Gardens, 4, Queen's Parade, Bangor, keep or use a certain room on the said premises for public entertainment, to wit music, without a licence for the purpose or purposes for which the said premises were to be and were used first obtained from the Council, the sanitary authority for the district, contrary to section 31 of the Local Government Act (Northern Ireland), 1934.

At the hearing of the summons, the following facts were admitted or proved:

The defendant had been in business as an amusement caterer for about twenty years, and was the occupier of the premises referred to in the summons; the premises consisted of a large room in which was a machine called a "Music Maker," colloquially known as a "juke box," which was the property of the defendant. There were also in

[1] In the Court of Appeal before Black and Curran L.JJ: June 30, 1958.

the room seventy assorted slot machines, a shooting gallery and a pongo game; and the public were invited by the defendant to resort to the premises and did so resort for the purpose of operating the machines, including the "juke box."

The "juke box" was a machine by which, when three pennies were inserted into a slot in it, musical records were automatically played; when the machine was in operation, the sound pervaded the premises and could be heard outside in the public street, though not sufficiently to constitute an attraction to persons in the street.

The premises were open to the public for approximately seven months of the year, from spring to autumn, between the hours of 10.30 a.m. and 11.30 p.m., and the "juke box" was available for operation until 10 p.m. each evening; the extent to which it was played varied with the extent to which the public resorted to the premises but remained reasonably constant in relation to the user of the other slot machines; it was an expensive machine to run and less profitable than the other machines; when operated, it was operated by members of the public and not by the defendant or his employees.

No licence under section 31 of the Act of 1934 had been obtained by the defendant, who contended that none was required. The complainant was the sanitary authority for the district in which the premises were situate.

The resident magistrate convicted the defendant and imposed a penalty of one shilling without costs, but at the request of the defendant, stated this case for the opinion of the Court of Appeal as to whether his decision was correct in law.

Lowry Q.C. and *McBirney* for the appellant. Section 31 of the Act of 1934 is regulatory and penal and should be strictly construed; the finding of the resident magistrate that the room was used for public music is in reality an inference from the facts proved in evidence, and is therefore subject to review in this court.

We submit that in order to constitute an offence under section 31, three elements must be present: (i) that there is a public entertainment; (ii) that the entertainment is provided by the defendant; (iii) that the entertainment complained of constitutes a substantial and integral part of the entertainment provided. As to (i), we submit that the entertainment must be something of an organised kind, and not left to chance: see *Attorney-General v. Southport Corporation*[1], per Lord Hanworth M.R.; with regard to (ii) we rely on *Brearley v. Morley*[2], where it was held that a licensee who kept a piano in the

[1] [1934] 1 K.B. 226, 237. [2] [1899] 2 Q.B. 121.

smoke room of his licensed premises upon which customers might play was held not to be guilty of a breach of section 51 of the Public Health Acts Amendment Act, 1890, which corresponds to section 31 of the Act of 1934; as to (iii), the question is whether the room was "kept or used for public music," and we submit this implies an element of purpose, so that if the music is not at least a main purpose for which the room is kept or used, one cannot say that it is kept or used for public music: see *Quaglieni v. Mathews*[1]; *Hall v. Green*[2]; *Fay v. Bignel*[3].

Bellis v. Beal[4] concerned a tea room provided with an organ and an organist, but it is distinguishable, for the court expressly found that the room was a room provided for musical entertainments.

Amusement Equipment Co. Ltd. v. McMillan[5] was based on *R. v. Tucker*[6], and the latter case concerned a skating rink, not merely music. In any event, we submit that the main point of the decision is wrong, having regard to *Brearley v. Morley*[7].

In *R. v. Rendez-vous Melody Milk Bar*[8] the Recorder of Liverpool took too narrow a view of the ratio in *Brearley v. Morley*[7], and his decision follows that in the *Amusement Equipment Co. Ltd.* case[5].

[They also referred to: *McDowell v. Maguire*[9]].

Jones Q.C. and *Hutton* for the Council. It is found that members of the public were invited to resort and did resort to the premises for the purpose of operating the machines, including the "juke box," and that music was automatically played mechanically, and we therefore submit that this case is comparable with the case of the provision of a pianist or an orchestra to play music at the request of customers. The defendant provided everything necessary for the playing of the music and clearly intended that it should be played, for although this machine was less profitable than others apparently he considered it a profitable adjunct to the premises. The figures given in evidence would indicate that the machine was in operation up to 80% of the time, compared with one third in *R. v. Rendez-vous Melody Milk Bar*[8]. This case is therefore stronger from the point of view of the Council

1 (1865) 29 J.P. 439.
2 (1853) 9 Ex. 247.
3 (1883) 1 Cab. & El. 112.
4 (1797) 2 Esp. 592.
5 (1941) 85 S.J. 333.
6 (1877) 2 Q.B.D. 417.
7 [1899] 2 Q.B. 121.
8 (1951) 15 Cr. L. Jo. 36.
9 (1954) 118 J.P. 555.

than those upon which the appellant relies. We rely on *Bellis v. Beal*[1] and *Frailing v. Messenger*[2].

In *McDowell v. Maguire*[3] Lord Goddard C.J. accepted the view that *Brearley v. Morley*[4] was based on the fact that the music was not provided by the occupier. The nearest case on the facts to the present is that of *Amusement Equipment Co. Ltd. v. McMillan*[5], and while the decision in the *Rendez-vous Melody Milk Bar* case[6] is not authoritative, we say it could scarcely have been decided otherwise on the evidence.

[CURRAN L.J. The appellant relies on *Brearley v. Morley*[4]; what would be the position in a case such as that if a "juke box" were provided instead of a piano?]

We say the present case is more nearly comparable with the provision of a piano and a pianist as well, for no skill is required by the person operating the machine, and another important factor in *Brearley v. Morley*[4] was the extent of the user, which was confined to two evenings in the week.

McBirney replied.

BLACK L.J.: In this case, the appellant, Frank Goldstein, was prosecuted under the provisions of section 31 of the Local Government Act (Northern Ireland), 1934. The count upon which he was charged and convicted was that he kept or used a certain room in his premises for public entertainment, to wit, music without a licence for the purpose. The licence which, according to the Borough Council, he ought to have obtained was a licence issued by the Council pursuant to the provisions of section 31 (2) of the Act.

As Curran L.J. pointed out several times in the course of the hearing, what the court has to do in a case of this kind is to go back to the wording of the section, and what the section says is this: "31.—(1) As from the commencement of this section a house, room, "garden or other place (in this section referred to as 'premises'), "whether licensed or not for the sale of wine, spirits, beer or other "fermented or distilled liquors, shall not be kept or used for public "dancing, singing, music, boxing or other public entertainment of the "like kind without a licence for the purpose or purposes for which the "premises are to be used first obtained from the sanitary authority of "the urban or rural district in which the premises are situate."

1 (1797) 2 Esp. 592.
2 (1867) 31 J.P. 423.
3 (1954) 118 J.P. 555.
4 [1899] 2 Q.B. 121.
5 (1941) 85 S.J. 333.
6 (1951) 15 Cr. L. Jo. 36

The object of this section is, of course, to establish a system of licensing which will give the local authority control over premises which are used for public entertainment. The idea of such a system was by no means a new one, for it goes back to the reign of George II, and throughout the Public Health Acts one finds provisions similar to those of section 31 of the Act of 1934. Those provisions, which are expressed in almost the same language throughout, have been discussed in various reported cases, and while that is so, we must, in the first place, go back to the words of the section. The words of the section, however, are not to be considered in isolation, but in relation to the facts of the case. Mr. Goldstein is described in the summons as an amusement caterer, and according to the facts found in the case stated has been engaged in this activity for upwards of twenty years. The activity is this, that he keeps on his premises a number of slot machines of various kinds, a shooting gallery and the "juke box" with which these proceedings are concerned, and, whether expressly or by implication, invites members of the public to enter the premises for the purpose of amusing themselves at the slot machines, the shooting gallery or the "juke box". Mr. Goldstein carries on business in this way, and the question is whether he is keeping or using a room for public music within the meaning of that phrase as it is used in section 31 of the Act of 1934.

Now the public are invited to enter the premises, and may play at the slot machines or the shooting gallery to amuse themselves, or they may put coins in the "juke box" to make it play, and amuse themselves in that way, and it seems to me the entertainment is certainly public entertainment, and if it is musical, it must be public musical entertainment. The facts show that for a good part of the time during which the premises were under observation, the "juke box" was in operation and was playing music which presumably entertained those who paid for it, and which so far as appears was not resented by the other members of the public who were present in the premises. I cannot see that that was not public entertainment, or that it was in any way merely subsidiary to the other forms of amusement provided on the premises; there was no real connection with them, and in my opinion each was a separate and distinct form of entertainment. This machine was there and available to any member of the public who was in the premises and anyone who wished could by inserting the appropriate coins start it playing for the purpose of entertaining himself or herself and his or her companions, or anyone else present who might be willing to be entertained in that way, and it seems to me therefore that it is tolerably clear that the room was being used for

public music. Taking the words of the section in their ordinary sense, and as they are used in common parlance it would be difficult to escape that conclusion, even though it may be that the room was being used for other purposes as well. The evidence shows too that the room was being "kept" for this purpose, for it is found that this machine was an expensive one and less profitable than the other machines, but nevertheless it was apparently regarded as a worthwhile feature of the premises to have a machine which would grind out music in this way. It is found that the music could not be heard sufficiently loudly in the public street to constitute an attraction to persons on the street. Still it is clear from the case stated that the "juke box" constituted one of the attractions on the appellant's premises and the appellant obviously found that there was money to be made from having it there.

Many cases were cited to us in argument, but Mr. Lowry relies on one in particular which might be described as his sheet anchor, *Brearley v. Morley*[1], a decision of Day and Lawrance JJ. That case concerned a hotel keeper who provided a piano in a room at his hotel on which customers were in the habit of playing for their own amusement and that of others in the room, and it was held that this did not constitute a breach of the corresponding section of the Public Health Acts Amendment Act, 1890. The only judgment in the case as reported is a short judgment of Day J., and it is somewhat difficult to extract from it the precise grounds of the court's decision. One would gather from some of the expressions used by Day J. that the basis of the decision was that the hotel keeper did not provide the music, for he says[2]: "It does not seem to me that any offence at all was committed. "The hotel-keeper provided a piano in his smoking-room just as he "provided tables and chairs, and the piano was used by the customers "frequenting the room. The appellant did not provide any music or "other public entertainment; he only provided a piano, and allowed "his customers to use it....", and he goes on to say: "I cannot see "that he provided any public entertainment...." The emphasis here is clearly on providing, but the word "provide" is not used in the section, which only refers to a room kept or used for public music, but even if providing is the key to the section, what is the position in the present case? It seems to me that if the decision in *Brearley v. Morley*[1] is based on the fact that the appellant did not provide the music, the present case is quite different. It was not the people who came on to the premises who provided the music; they only paid to

[1] [1899] 2 Q.B. 121. [2] Ibid. 123.

hear it. It was provided by the proprietor, who supplied the "juke box" and the means to operate it. It does not appear whether it was operated by electricity, as it may have been; but whether it was or not, it was the owner of the premises who provided the music, so that if "provide" is the key, then this case is clearly distinguishable from *Brearley v. Morley*[1], although as I have indicated, the word "provide" does not appear in the section.

Another ground for the decision in *Brearley v. Morley*[1], may have been that there was no habitual user of the room for the purpose of public music, and the learned judge appears to have placed some reliance on this also. The section under which the prosecution in the present case was brought does not refer to habitual user either, but it uses the word "purpose," and it is apparent that evidence of user on more than one occasion would be required to justify a conviction. In the present case, there is ample evidence of such user. The premises were open each day throughout the summer, and although the "juke box" was closed down at 10 o'clock in the evening, it was open for the playing of music for many hours each day. Accordingly, if there is any importance to be attached to the matter of habitual user, this case is distinguishable from *Brearley v. Morley*[1] in that respect also.

Without then venturing to question the soundness of the decision in *Brearley v. Morley*[1] on its own facts, I find the facts established in the present case are so totally different from those of *Brearley v. Morley*[1] that that decision affords no real support to the present appellant. Looking at the words of the section, and considering what went on in the appellant's premises during the period with which the evidence was concerned, I cannot escape the conclusion that the appellant was keeping and using a room for public music, even though the room was also used at the same time for other forms of entertainment. It follows that in my judgment the learned resident magistrate's decision was correct.

Curran L.J. I agree, and have little to add, except to say that I share the view expressed by Black L.J. as to the decision and the dicta to be found in *Brearley v. Morley*[1]; but as he has said, it is not necessary for us to deal with that case in view of the circumstances of

[1] [1899] 2 Q.B. 121.

this case. If it were necessary to express any view on *Brearley v. Morley*[1], I should disagree with it.

Appeal dismissed.

Solicitors for the appellant: *George McCracken & Co.*

Solicitor for the Council: *Frank McKee.*

J.P.

[1] [1899] 2 Q.B. 121.

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ARBITRATION—*Drainage works causing damage to fishery—No mistake of law on face of award except by inference—Motion to set aside award.* The owners of a several fishery which had been damaged by the execution of drainage works carried out by the Ministry of Finance in pursuance of the powers conferred by the Drainage Acts (Northern Ireland), 1929 to 1952, claimed compensation in respect of the financial loss occasioned. The claim was made in 1951 and at the hearing of the arbitration in 1956 the arbitrator applied a rental basis for assessment of compensation and took the fishing season 1950-51 as an appropriate date when the depreciation in value could be assessed. The award was challenged on the ground, inter alia, that the arbitrator was wrong in law in holding himself bound to ignore evidence regarding the conditions affecting the fishery after 1950-51. *Held*, that though it was a reasonable inference that the arbitrator had mistakenly thought himself bound to ignore the evidence relating to the period after 1950-51, yet as this fact was not so stated in terms on the face of the award it could not be maintained that the arbitrator had erred in law. *The Hon. the Irish Society v. Ministry of Finance.* [Q.B.D. 170

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registered until after the date of the testator's death which occurred within three months of the execution of the will. The next-of-kin having claimed that the residuary bequests to the three charities failed in so far as they consisted of the residue of the purchase money from the sale of the farm by reason of section 16 of the Charitable Donations and Bequests (Ireland) Act, 1844. *Held*, (i) that notwithstanding that the transfer had not been registered at the date of the testator's death, the purchaser had acquired an equitable interest in the land so extensive as to leave the testator no beneficial interest which could be accounted an "estate in lands" for the purposes of section 16 of the Charitable Donations and Bequests (Ireland) Act, 1844; (ii) that even if the testator died possessed of any beneficial estate in the land, such estate was held by the executor in trust, not for the residuary legatees, but for the purchaser. *In re Scarlett.* [C.A. 28

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LOCAL GOVERNMENT—*Street vested in local authority—Nature of authority's interest in site of street—Duration of interest—Stopping up order—Power to impose term requiring payment of money as condition of making order—Belfast Improvement Act*, 1845 (8 & 9 *Vict. c. cxlii*), *s.* 12—*Belfast Improvement Act*, 1878 (41 & 42 *Vict. c. clxxx*), *s.* 52.

The plaintiff company, the owner of all the lands abutting on a public street in Belfast which had become disused after the air raids in 1941, applied to the Belfast Corporation pursuant to section 52 of the Belfast Improvement Act, 1878, for an order stopping up the street. The Corporation, being satisfied that it would not be prejudicial to the public interest to do so, agreed to make the order sought on certain terms. One of these terms was that the plaintiff company should pay to the Corporation a sum representing one-third of the value of the ground involved. The company objected to this term, contending that, as owner of the land, it was entitled to have the land returned without any such payment on the determination of public rights over the street. It was accepted by both parties that the street in question was vested in the Corporation by reason of section 12 of the Belfast Improvement Act, 1845. *Held*, by McVeigh J., (i) that there was vested in the Corporation the property in the surface of the street and in an undefined depth below the surface extending so far as was necessary for the purpose of maintaining and preserving the street as a public highway: (ii) that the interest of the Corporation was determinable and endured only so long as the street remained a public street, so that the Corporation had no disposable interest in the street. *Held*, by the Court of Appeal, reversing McVeigh J. on this point, that the Corporation had no power to include in the order stopping up the street a term providing for the payment of a sum of money in respect of the relinquishment by the Corporation of either public rights over the street or the Corporation's interest in the street. Per curiam. Where a local authority is given a statutory power exerciseable in its discretion it cannot lawfully impose a charge as a condition of exercising that power unless clearly authorised so to do by statute. *Attorney-General v. Wilts. United Dairies* (1921) 37 T.L.R. 884 applied. *City Brick and Terra Cotta Co. Ltd. v. Belfast Corporation.*

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MARKET FRANCHISE—*Disturbance—Purchase of pigs and pig carcases outside market—No possible concourse of buyers due to change in methods of marketing—Whether rival market.* The plaintiffs had exclusive market rights, including a right to tolls, in respect of a franchise market in the town of Enniskillen. For many years up to July 1948, the great majority of bacon pigs in Northern Ireland were sold dead and the market did a very substantial trade in pig carcases. It was the practice of curers from all parts of Northern Ireland to attend the market as purchasers. The dead pig market was held every Tuesday, when carcases were weighed and the market owners were paid tolls and weighing charges. The first-named defendant, the S.C.W. Society (hereinafter referred to as "the Society") was the principal purchaser and for some years had paid to the market owners a sum in lieu of tolls and weighing charges in respect of any carcases bought direct from the producers at the farms and which did not pass through the market. About the year 1945 the Ministry of Agriculture, which was anxious to bring about a development of bacon pig production in County Fermanagh, encouraged the Society to embark on a considerable alteration and improvement of its premises in Enniskillen, including the building of its own abattoir, and the Ministry undertook to use the premises as the principal collecting centre in the county for live pigs and to employ the Society as agent for the allocation and distribution of carcases to other curers. This scheme came into operation in July 1948, after the appearance in the press of an advertisement informing pig producers of the opening of the new abattoir and announcing an arrangement whereby the Transport Board would collect live pigs at the farms at a special charge. After the inception of the new scheme neither the Society nor the Ministry, nor any other curer or person authorised to purchase bacon pigs, attended at the plaintiffs' market, nor was any sum paid in lieu of tolls. All pigs of bacon weight were either collected pursuant to the Ministry's arrangement with the Transport Board or delivered at the new abattoir by the producers themselves. Dead pigs delivered were also accepted by the Society at its premises. The plaintiffs brought proceedings claiming a declaration of their rights and damages and injunctions against the defendants and each of them on the grounds of disturbance of, and conspiracy to disturb, their market rights. *Held*, by the Court of Appeal (Lord MacDermott L.C.J. and Black L.J., Sheil J. dissenting), affirming the decision of Curran J. on this point, that

there was no disturbance in respect of live pigs purchased from producers by the Ministry and delivered at the Society's premises by the advertised transport facilities on the ground that the contracts for the sale of such pigs were made on producers' farms outside the market area; *Held*, by the whole court, reversing the decision of Curran J. on this point, that the acts of the Society, the Minister of Agriculture, and the Ministry of Agriculture complained of by the plaintiffs amounted in law to the tort of disturbance in respect of (a) live pigs purchased by the Ministry and delivered at the Society's premises by producers, and (b) dead pigs sold by producers to the Society at the Society's premises. *Held*, further, by the whole court, that the evidence did not support the allegation of conspiracy to disturb the plaintiffs' market. Decision of Curran J. affirmed in part and reversed in part. *Ulster Farmers' Mart Co. Ltd. v. Scottish Co-Operative Wholesale Society Ltd. and others.*

[Ch.D and C.A. 78

MOTOR VEHICLE—*Motorist convicted and disqualified from holding or obtaining a driving licence—Order of petty sessions confirmed by quarter sessions—Application for removal of disqualification—Application to be made to petty sessions—Road Traffic Act (Northern Ireland)*, 1955 (4 & 5 *Eliz. 2. c.* 27), *s.* 57 (4). Section 57 (4) of the Road Traffic Act (Northern Ireland), 1955, provides that "a person who by virtue of "a conviction or order is disqualified "from holding or obtaining a licence "may. . . . apply to the court before which "he was convicted or by which the order "was made to remove the disqualifica- "tion. . . ." Where a motorist is convicted and an order for his disqualification made at petty sessions, and the conviction and order are confirmed on appeal to quarter sessions, the court of quarter sessions is not "the court before "which he was convicted or by which the "order was made" within the meaning of the section. Applications for removal of disqualification should be made to petty sessions notwithstanding that the conviction and disqualification were confirmed by order of quarter sessions. *Sherrard v. Woods.* [C.A. 13

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1. PARLIAMENT—*Election petition—Disqualification—Knowledge of electors—Votes thrown away—Forfeiture Act*, 1870 (33 & 34 *Vict. c.* 23), *s.* 2—*Representation of the People Act*, 1949 (12, 13 & 14 *Geo.* 6, *c.* 68), *Part III.* At the general election for the Parliament of the United Kingdom in May 1955, the petitioner and the respondent were the only candidates for the seat to represent Mid-Ulster. The respondent polled a narrow majority of the votes and was declared elected. Thereafter it was declared by Parliament that the respondent had been incapable of and disqualified from being elected or sitting or voting as a member of Parliament by reason of the fact that at the time of the election he was serving a sentence of ten years' imprisonment for treason felony, and it was accordingly declared that the seat was vacant. The respondent's sentence was imposed on him upon his conviction at the Winter Assizes in December 1954, on a charge arising out of his participation in an armed raid on a military barracks at Omagh—the principal town in the constituency—in October 1954. At the by-election held in August 1955, in consequence of the seat having been declared vacant, the petitioner and the respondent were again the only candidates nominated, and again the respondent polled a narrow majority of the votes and was returned as elected. The petitioner thereupon applied to the Queen's Bench Division of the High Court under the provisions of the Representation of the People Act, 1949, for a determination that the respondent had not been duly elected or returned, and that he, the petitioner, had been duly elected and ought to have been returned. At the hearing of the petition the respondent's conviction and sentence and the fact that he was still undergoing sentence were proved, and evidence was adduced that the respondent's trial and his conviction and sentence had been widely publicised at the time in newspapers circulating in the constituency; that at the time of the general election these matters had again been widely publicised; that the proceedings in Parliament leading to the declaration of the respondent's disqualification had been reported in the constituency by the press and in radio news bulletins; and that attention had been publicly drawn to all these matters in the course of the by-election campaign. It also appeared that the respondent's address as stated on the ballot papers at both elections was "H.M. Prison, Belfast." *Held*, that, on the evidence, the facts leading to the

respondent's disqualification had received such wide publicity as to cause them to be notorious throughout the constituency, and that the petitioner had therefore established that a sufficient number of the votes cast for the respondent had been so cast with knowledge of the facts leading to his disqualification and were to be regarded as not given at all or thrown away, and that accordingly the petitioner was entitled to the determination sought. *Held further* that a notice sent out by the petitioner to all the electors with his election address was of itself an insufficient notice of the facts leading to the respondent's disqualification, in that it merely stated that the respondent was a convicted felon, and did not specify that he had been sentenced to a term of imprisonment in excess of twelve months and was still undergoing sentence. *In re Mid-Ulster Election Petition.* [Q.B.D. 143

2 ———— *Election petition — Disqualification—Knowledge of electors—Votes thrown away—Forfeiture Act*, 1870 (33 & 34 *Vict. c.* 23), *s.* 2.—*Representation of the People Act*, 1949 (12, 13 & 14 *Geo.* 6, *c.* 68), *Part III.* At the general election for the Parliament of the United Kingdom in May 1955, the petitioner and the respondent were the only candidates for the seat to represent Fermanagh and South Tyrone. The respondent polled 30,529 votes and the petitioner polled 30,268. The respondent was accordingly declared returned by a majority of 261. The petitioner applied to the Queen's Bench Division of the High Court under the provisions of the Representation of the People Act, 1949, for a determination that the respondent had not been duly elected or returned and that he, the petitioner, had been duly elected and ought to have been returned, for the reason that the respondent at the time of the election was to the knowledge of the electors serving a sentence of ten years' imprisonment for treason felony. Evidence was adduced that the respondent had been convicted of an offence under section 3 of the Treason Felony Act, 1848, at the Winter Assizes in 1954, and that he was still undergoing the sentence of ten years' imprisonment which had been imposed upon him, and it was also given in evidence that advertisements reciting these facts and giving notice that as a result the respondent was disqualified from being elected had been published in newspapers circulating in the constituency; that the respondent's disqualification had been discussed in the news columns of the same and other newspapers; that the petitioner's agents had sent by post to 30,121 electors believed not to be supporters of the petitioner leaflets to the same effect as the advertisements, and that posters in similar terms had been exhibited near most of the polling stations in the constituency on polling day. It also appeared that the address of the respondent as stated on the ballot papers was "H.M. "Prison, Crumlin Road, Belfast." *Held*, that the disqualification of the respondent was a matter of notoriety throughout the constituency and that a number of persons far in excess of his majority had recorded their votes with knowledge of his disqualification, and that accordingly the petitioner was entitled to the determination sought. *In re Fermanagh and South Tyrone Election Petition.* [Q.B.D. 151

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PENSION—*Entitlement—Claim made more than seven years after termination of military service—Onus of proof—Scope of "reasonable doubt"—Royal Warrant of May* 24, 1949, (*Cmd.* 7699), *art.* 5. Article 5 of the Royal Warrant of May 24, 1949, provides that in determining whether to certify that death or disablement is due to a service factor "where, "upon reliable evidence, a reasonable "doubt exists....the benefit of that "doubt shall be given to the claimant." *Held*, that if a reasonable doubt arises upon reliable evidence the claimant is entitled to the benefit of that doubt notwithstanding that there is a strong preponderance of probability against the claimant's case. If there is reliable evidence upon which a reasonable doubt could arise, it is for the tribunal to decide whether such doubt exists. Meaning of the words "reasonable doubt" in paragraph (4) of article 5 considered. *Minister of Pensions v. Greer.* [Q.B.D. 156

PRACTICE—*Particulars—Action for personal injuries—Special damage—Loss of wages as substitute teacher—Particulars of previous earnings in that capacity. Jeffs v. Dickson* (*Practice note*) [Q.B.D. 12

PUBLIC HEALTH—*Licence for public entertainment—Amusement arcade open to the public—Automatic gramophone operated by members of the public insert-*

ing coins—Room used for public music—Local Government Act (Northern Ireland), 1934 (24 & 25 *Geo.* 5, *c.* 22), *s.* 31. The appellant kept a large room containing about 70 slot machines of various kinds, a shooting gallery and other amusements, and also an automatic gramophone or "juke box" which could be operated by inserting coins and depressing buttons to select the records to be played. Members of the public were invited to come in and no charge was made for admission. The "juke box" was available for operation some 12 hours each day and during this time it was operated frequently by members of the public, but not by the appellant nor by his servants. While the "juke box" was in operation the music could be heard throughout the premises, and to some extent in the street outside. The appellant was convicted of keeping a room for public entertainment, to wit, music, without a licence for the purpose having been first obtained, contrary to section 31 of the Local Government Act (Northern Ireland), 1934. *Held*, that although the room contained a number of machines other than the "juke box," each constituted a distinct and separate entertainment, and that the "juke box" was in no way subsidiary to the other forms of entertainment, and that accordingly the appellant had kept a room for public music. *Brearley v. Morley* [1899] 2 Q.B. 121 considered. *Bangor Borough Council v. Goldstein.* [C.A. 189

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